TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 193

No. 719

THE COLORADO NATIONAL BANK OF DENVER, APPELLANT

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

FILED FEBRUARY 12, 1940.

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[fol. 1]

IN DISTRICT COURT OF THE CITY AND COUNTY OF DENVER

HOMER F. BEDFORD, as Treasurer of the State of Colorado, Plaintiff,

v.

THE DENVER SAFE DEPOSIT COMPANY, a Corporation; T. W. Rinker and L. R. Kirby, Co-partners, Doing Business Under the Firm and Style Name of The Guardian Safety Vault Company, The Colorado National Bank, a Banking Corporation, Defendants

AMENDED PETITION FOR DECLARATORY JUDGMENT

I

Plaintiff is the duly elected, qualified and acting Treasurer of the State of Colorado, and as such is delegated the duty of administering and enforcing the provisions of the Public Revenue Tax Act of 1937, appearing as Chapter No. 240, 1937 Session Laws of Colorado.

(Paragraphs numbered II and III are omitted as they refer only to defendants other than the Bank, and the action was dismissed as to the said other defendants.)

IV

The defendant, The Colorado National Bank, is a national banking corporation duly organized and existing under and [fol. 2] by virtue of the laws of the United States of America.

V

(Omitting portions of paragraph V relating to other defendants.)

However, said defendant, The Colorado National Bank, conducts its said safety deposit services in its banking house or building located in the City and County of Denver, and said safety deposit boxes are fixtures in and constructed within said building as a part thereof, and constitute part of the assets of said defendant bank. Regular and fixed charges are made for the rental of said safety deposit vaults

to any member of the public, whether he be a customer of said bank in its rendition of its other services or not.

VI

Pursuant to the provisions of said Public Revenue Service Tax Act of 1937, plaintiff prescribed and published rules and regulations and interpretations of said Act on or about the 10th day of June, 1937. Subsequently thereafter, said rules and regulations and interpretations were amended, and as amended republished on the 22nd day of October, 1937. Provisions pertinent to said depository services operated by defendants herein, are in words and figures as follows:

"10. Banks. Services rendered or performed by banks were included in the Act. It now appears that the law is invalid as applied to National Banks. Following the general principle of law and taxation now established, to the effect that where a tax statute intended to apply state-wide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all [fol. 3] banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"11. Banks—Acting As Agent or Trustee. Taxable services performed at the request of a bank, which services are being performed for a client of such bank, paid for by such client, are subject to the Service Tax Act and taxable, even though the bank actually requests the service and actually remits payment for the charges therefor. The bank in such instances is merely acting as agent for its client."

"27. Depositories. Such service rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor."

Pursuant to said Act and said rules and interpretations, plaintiff demanded from each of said defendants that he collect and remit the 2 per cent service tax upon the charges

for depository services, to-wit: On or about July 29, 1937, plaintiff * * * on August 21, 1937, * * * duly mailed postpaid copies of the original draft of the above rules and interpretations before same were amended, to the Colorado Bankers Association, Tabor Building, Denver, Colorado, with the demand that banks comply therewith, and that the Association so inform its members; and on or about August 27, 1937, plaintiff, by and through J. B. Owens, state revenue collector, made a personal call upon defendant Colorado [fol. 4] National Bank, and discussed said demand with Mr. W. L. Robertson and Mr. George Klein, and thereupon repeated the demand that said defendant collect and remit service taxes on its depository services and make returns therefor; and each of said defendants has refused to collect or remit any of said taxes or in any manner comply with the said law.

VII (As Amended)

It is the contention of plaintiff that all of said defendants are engaged in rendering a taxable service under the terms of said Public Revenue Service Tax Act, which service is named in said Act, Section 5 (c), as "Depositories," and that they are responsible and liable for said tax, whether collected from its customers or not, in the manner provided in said Act.

It is plaintiff's further contention that services performed by depositories, whether they be operated by a Colorado State corporation organized for the sole purpose of operating depositories or by individuals, or by banks, State or National, are performing taxable services within the purview of said Act.

It is plaintiff's contention that the operation of "Depositories" constitutes the rendition of taxable services within the Service Tax Act, Section 5 (c) thereof, and that National banks must collect the tax on such services even though the other services rendered by such bank, commonly known as services performed by a "bank," are not taxable; and that all defendants are operating such "depositories" in the same manner. Plaintiff further contends that the fact that a National Bank, in operating a "depository," operates same in connection with or as a part of its banking business, or that such operation is authorized by law, makes no difference, and does not exempt the bank from complying [fol. 5] with the Service Tax Act, as the tax is not imposed

on the banks but upon the purchaser of the service. The only service rendered, performed or furnished, or business engaged in, by any of the defendants, claimed by plaintiff to be taxable, is the operation of the "Depositories." Plaintiff further contends that the rules set forth in paragraph VI hereof are reasonable, proper and within the law, and constitute a declaration of plaintiff s claim herein.

VIII

A controversy exists between plaintiff and defendants as to whether or not such services are taxable, and as to whether or not said defendants should collect and remit said taxes under the terms of said Act. The nature of such controversy, in substance, is that the Act in naming banks as rendering a taxable service, was, in effect, imposing a tax upon the banks in conflict with the federal laws, and hence invalid as to the banks, and that insofar as such act purports to tax the services of a depository not operated by a bank, is discriminatory and invalid.

IX

In administering said Public Revenue Service Tax Act of 1937, plaintiff has not and does not levy or demand any tax upon a National Bank, nor does plaintiff require or demand that any National bank pay any tax or license directly from the funds of such bank, but plaintiff has demanded and required all persons or institutions operating a depository or depository services, to collect and remit the required 2 per cent tax on charges made therefor; and plaintiff further has demanded and continues to demand that any person or institution or corporation failing or refusing to so collect such tax from its customers, be held re- [fol. 6] sponsible and liable therefor in the manner provided, whether collected from its customers or not.

Plaintiff has not and does not require or demand a National bank to collect or remit a service tax upon any of its services performed, except upon services performed in operating a depository, and upon services performed for a bank acting in a trust or representative capacity for its customer or client. Plaintiff is informed and believes, and so alleges the facts to be, that National banks are complying with the requirement and ruling requiring banks to pay service taxes on services performed at the request of such

bank acting in the representative or trust capacity for its clients, customers and trust estates.

Wherefore, plaintiff prays for a declaration of rights and other relief as follows:

First. That this Court determine and declare that the services performed by defendants in operating safety deposit vaults, are taxable pursuant to the terms of the Public Revenue Service Tax Act of 1937.

Second. That this Court determine and declare that the operation of such safety deposit vaults by said defendant Bank, is a taxable service rendered by such Bank to the public, in that such Bank in so operating safety deposit vaults comes within that provision of said Act covering depositories, and that in that respect said Act is valid and a proper tax is imposed.

Third. That this Court determine and declare that the defendants, Safety Deposit Companies, are operating depository services within the meaning of said Act and are subject to its provisions, regardless of whether or not the Act is invalid as to the other defendant.

[fol. 7] Fourth. That this Court render such other judgment as may be just and equitable, and for costs of this action.

(Said petition was verified.)

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

ANSWER TO AMENDED PETITION

Now comes the defendant, The Colorado National Bank of Denver (hereinafter called the Bank), by Bartels, Blood and Bancroft, its attorneys, and answering plaintiff's amended petition for declaratory judgment and the amendment to paragraph VII thereof alleges:

1. That it admits the allegations of paragraph I.

2. That as to paragraph IV, its admits that the Bank is a national banking association organized and existing under and by virtue of the Constitution and Acts of Congress of

the United States, with its banking house or office and place of business in the City and County of Denver, Colorado; and the Bank alleges that as such national banking association it is an agency and instrumentality of the United States.

3. That it admits the allegations of paragraphs V and VI. * * *

4. That further answering paragraph VI as to the rulings, regulations and interpretations of the plaintiff with reference to the said Service Tax Law and the notices given by him to the Bank, it alleges that on April 19, 1938, the plaintiff gave the Bank notice in writing that under his rulings, regulations or interpretations, the only service performed by banks subject to the Service Tax Act is the operation of depositories and safety deposit boxes, and that [fol. 8] none of the Bank's other services, and particularly none of its services rendered and performed in a fiduciary capacity are taxable; and that he made his said ruling, regulation or interpretation and gave the defendant Bank the said written notice and advice thereof, notwithstanding his contention in this action that any alleged tax on services performed by the Bank is not a tax upon the Bank, but upon the purchaser of the said services and for whom they are rendered, performed or furnished; and the Bank admits that the plaintiff contends as set forth in his amendment to paragraph VII of his said amended petition, without, however, admitting that his said contentions are valid, legal or proper.

5. That the Bank alleges that it has refused and will refuse to comply with the said Service Tax Act for the reasons hereinafter stated; and as to the allegations of paragraphs VIII and IX of the said petition, the Bank admits that there is an actual and justiciable controversy between the plaintiff and the Bank requiring judicial determination and a declaration of their rights with respect thereto, and alleges that the said controversy arises from the plaintiff's contentions, and from the defendant's contentions as hereinafter stated, as to the proper construction, operation and effect of the said Service Tax Act, particularly as it may affect the Bank as a national banking association. The Bank also admits that the plaintiff has demanded that the Bank be held liable and responsible to the plaintiff for the full amount of the said service tax at the rate of two per cent on all charges made by it for its said depository serv-

ices, in the manner provided in the Act and as hereinafter specified, and that it remit the said full amount to the plaintiff whether or not it collects the said sum, in whole or in part, from its customers receiving the said depository [fol. 9] services.

6. That with reference to the safe deposit services and the Bank's operation of a public safe deposit service, the Bank alleges that the same is an incident to and integral part of its banking business, and requisite for the safe and convenient attainment of the purposes for which it was created under the authority and laws of the United States. Further, in this respect, the Bank avers that it owns its banking house, office and building in the City and County of Denver, Colorado, which is subject to ad valorem tax, and is so taxed as real estate; that its safe deposit boxes are fixtures in the said building and are subject to the said ad valorem tax and are so taxed; that constructed within the said building, as a part of it, are two vaults of steel and concrete, one four stories in height and the other two stories in height; that only parts or portions of the said vaults are used in operating a depository for the safekeeping of valuables for the general public; that only the first and second floors of one of the said vaults is so used, and that the third and fourth floors of the one said vault are used by the Bank for the keeping, in its banking business, of its cash, securities and other valuables, and only the second floor of the other said vault is used as a depository for the safe keeping of valuables for the general public, while the first floor or basement thereof is used for banking purposes, as above stated. That the vaults of the said Bank, with their fixtures, were constructed at a cost of not less than $162,000.00. That the rentals procured for the use of portion of the said vaults, as aforesaid, are reported to the Comptroller of the Currency as profits or income of the Bank to be used and dis- [fol. 10] tributed as provided by the Acts of Congress and the rules and regulations of the said Comptroller, and, in part, repay the Bank for the cost of the construction and the operation of the two said vaults in their entirety, and the Bank's other operating expenses and charges. That the two said vaults in their entirety and the fixtures thereof are part of the assets of the Bank, and that the said assets and the operations thereof and the rentals received therefrom are examined, inquired into and considered by the Comp-

troller of the Currency of the United States in determining and passing upon the conditions and earnings of the Bank, and under the laws of the United States are subject to the said Comptroller's supervision.

7. That under and pursuant to the permission granted by the United States Revised Statutes, Sec. 5219, as amended (U. S. C. A., Title 12, Sec. 548), the State of Colorado has by law elected to tax and is taxing the Bank, on its net income, from the period commencing July 1, 1937, and that the said state, and political subdivisions thereof, have taxed and are taxing the Bank's real property to the same extent, according to its value, as other real property is taxed; and that prior to July 1, 1937, the said state, and its subdivisions, taxed the shares of the said Bank under and pursuant to the first method of taxation granted and permitted by the said Section 5219, as amended.

8. That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both.

9. That the said controversy arises because of the plaintiff's said rulings, regulations or interpretations of the said Service Tax Act and the Bank's contentions that they are [fol. 11] invalid, unlawful, unconstitutional and improper as applied to the Bank; and that its said contentions are as follows, to-wit:

(1) That the said Service Tax Act expressly provides in part, in recognition of the Constitution of the United States and of the Acts of Congress, restricting taxation of national banks, that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt from taxation," under the said Act; that the depository service of the Bank is part of its banking business under its federal charter and within the said quoted exemption; and that the said quoted provision should be construed and interpreted as exempting the Bank's said service from taxation because it would otherwise be subjected to the other provisions of the said Act, which must then be held unlawful and unconstitutional as against it and which are as follows, to-wit:

(a) That the Bank in performing any banking service, including the service of renting safe deposit boxes, is obli-

gated by the Act to account to the State Treasurer, and is expressly made the "taxpayer" thereunder;

(b) That there is imposed, by the said Act, a tax equivalent to 2% of the value of services rendered or performed by any person, and particularly by the Bank, engaging or continuing in its business as a bank, except as to interest on money loaned;

(c) That as such taxpayer the Bank is required, in engaging in the banking business, and in rendering and performing banking services, including the rental of safe deposit boxes, to apply for and procure a license from the State Treasurer, and that its failure to do so is a crime and [fol. 12] misdemeanor, punishable accordingly;

(d) That the Bank, in engaging in the banking business, and rendering or performing services, including the rental of safe deposit boxes, is liable and responsible for the tax imposed and payable upon those services rendered or performed; and for failure to pay the said tax, if there be any deficiency in that respect, the Bank shall be additionally liable for 10% of the deficiency and interest at the rate of 1% per month on the amount of the deficiency from the time due;

(e) That if no return be made by one performing services taxable under the said Act the said State Treasurer may give written notice to make such return within 30 days from the date thereof, and in the event of the failure or refusal of such person to make such return, the said State Treasurer may make it, and it shall be prima facie correct, and the amount of the tax due thereon shall be deemed a deficiency and subject to the addition of penalties and interest;

(f) That contrary to the laws of the United States, and particularly United States Revised Statutes, Sec. 5242 (U. S. C. A., Title 12, Sec. 91), a first and prior lien for the said tax is imposed upon all of the goods and property of the Bank, and that said lien shall take precedence over other liens or claims of whatsoever kind or nature; and

(g) That the refusal of the Bank (and it has refused) to pay said tax from time to time is, in each instance, a crime and misdemeanor, punishable by a fine of $1,000.00 or by imprisonment not exceeding six months in the county jail, or both such fine and imprisonment.

(2) That the Bank, as a national bank, is a governmental [fol. 13] agency or instrumentality of the United States; that the defendant in enforcing, or attempting to enforce, the said Service Tax Act as to the Bank, as hereinbefore alleged, is imposing a tax against the Bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his rulings, regulations or interpretations with respect thereto is seeking to deprive the Bank of a right, privilege or immunity secured to it by the Constitution of the United States.

(3) That services furnished by storage and warehouse businesses conducted generally by storagemen and warehousemen are not taxed under the said Act; that the legal relation between a customer or depositor and such storagemen and warehousemen with respect to the deposit of valuables and other personal property is that of bailor and bailee; that the services of the Bank in this respect are identical and the legal relation between its customers and it is the same; and that the claim asserted by the plaintiff, as hereinbefore alleged, with respect to the said Service Tax upon the Bank's depository business is an unlawful and unjust discrimination between so-called storagemen and warehousemen doing depository businesses not subject to the said tax, and national banks doing depository businesses, and is in violation of the Constitution of the State of Colorado and of the Fourteenth Amendment to the Constitution of the United States.

(4) That the plaintiff by admitting that none of the other services, such as fiduciary services, performed by the Bank are taxable even though the Bank might collect the service [fol. 14] tax on such services from those for whom they are performed, and that all of such other services are exempt from taxation is estopped to deny that its depository services are also exempt; and that any interpretation of the said Act made by the plaintiff other than that all of its services are exempt is arbitrary, inconsistent, discrimnatory and unlawful.

(5) The that the State of Colorado, by the enactment of its Income Tax Law (1937 Session Laws of Colo., Ch. 175), subsequent to the enactment of the said Service Tax Act,

and by the express adoption, in the said Law (Sec. 2, e, (1), p. 681) of "the method numbered (4) authorized by the Act of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States" (U. S. C. A., Title 12, Sec. 548) as the said state's exclusive method of taxing national banks, and by the repeal, in the said law, of all laws in conflict with it, has repealed the said Service Tax Act, insofar as it may be construed as attempting to tax a national bank.

Wherefore, the Bank prays:

First. That the prayer of the plaintiff's amended petition for a determination and a declaration of rights as against the Bank and for other relief be denied, and said petition be dismissed.

Second. That this Court determine and declare that under and by virtue of the Constitution and laws of the United States and under and by virtue of the Constitution and laws of the State of Colorado, all services performed by the Bank, including its depository services, are exempt from taxation under the Public Revenue Service Act of 1937 of Colorado.

Third. That this Court render such other and further re-[fol: 15] lief as may be just and equitable, and judgment against the plaintiff for the Bank's costs in this cause expended.

(The answer was verified.)

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

STIPULATION TO STAND ON DEMURRER ETC.

1. That this cause may be forthwith set for argument and final determination upon the general demurrer of plaintiff filed herein to the answer of The Colorado National Bank of Denver; that it is the intent of the parties that the matters herein involved be finally and fully determined upon said demurrer, and that a judgment be entered upon such determination declaring the rights and liabilities of the parties hereto.

2. That the parties will stand upon the ruling of the Court on said demurrer to the answer of The Colorado

National Bank of Denver, and thus permit a declaratory judgment to be entered in accordance with the decision of the Court; provided, however, that both parties reserve their rights to object and except to the ruling and judgment of the court in whole or in part, and to seek a review thereof in any proper court of appellate jurisdiction.

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

DEMURRER TO ANSWER

Comes now the plaintiff above named, by his attorneys, and demurs to the answer of the defendant, The Colorado National Bank of Denver, for the following reasons:

[fol. 16] 1. That said answer does not state facts sufficient to constitute a defense to the petition herein as amended.

2. The facts alleged in said answer are not sufficient to entitle defendant to the relief it prayed for in said answer; nor are such facts sufficient to warrant a denial of the relief prayed for in said petition as amended.

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

MEMORANDUM OPINION

Homer F. Bedford as Treasurer of Colorado seeks a judgment declaring that the services rendered by Colorado National Bank in maintaining safety deposit boxes and vaults for use for hire by the public are taxable under Colorado Service Tax Law of 1937. The Bank claims such services are exempt from taxation. The matter is before the Court on the plaintiff's demurrer to defendant's answer.

The Colorado Service Tax law imposes a tax on services rendered, makes the person performing the services personally liable to the state for all taxes paid by those receiving the services and also personally liable to the state for all taxes due for services rendered, whether they are collected or not. The Act defines the term "taxpayer" as the person obligated to account to the state for taxes collected or to be collected or due the state. Persons performing

taxable services are required by the Act to procure a license from the state and to make monthly reports to the state treasurer. The tax imposed by the Act is made a lien upon the goods and property of the person performing the services.

In the detailed list of businesses in connection with which services are taxed under the Act appears the following: "banks, finance companies, trust companies and deposi- [fol. 17] tories," and plaintiff contends that this language authorizes the state in demanding that plaintiff account to the state for depository services rendered, in accordance with the Act. Section 7 of the Act provides, inter alia, that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this Act," and the Bank's claim of exemption is based upon this provision. The Bank claims that the service tax law makes the performer of the services the taxpayer, and that such form of taxation is prohibited by Act of Congress (U. S. Code Annotated, Title 12, Sec. 548), reading in part as follows:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

It is admitted that the State of Colorado taxes national banks on their income. The state admits that if the service tax law imposes the tax on the bank, that the exemption applies, but asserts that under our statutes the person performing the services is merely an agent of the state for [fol. 18] collecting the tax, and consequently the real taxpayer is the recipient or the purchaser of the services. Cases are cited by both sides from other states interpreting

tax laws similar to the one here being scrutinized. In the recent case of Rinn v. Bedford, not yet reported, our Supreme Court held the service tax law constitutional and denominated the tax imposed an excise tax. While the question of who is the taxpayer was not directly involved in that case, the opinion refers to the "tax imposed upon attorneys at law." The Court was referring to taxes upon services rendered by attorneys and not to services rendered to attorneys by others. The California sales tax law imposes the tax on retailers as a tax on the privilege of doing business, and has been upheld as a valid excise tax. The Kentucky sales tax law by its terms makes the retailer the taxpayer, but the courts of that state interpreted it as a tax on the consumer or buyer. (City of Covington v. Tax Commission, 77 S. W. (2d) 386.) The Court in that case cited Pierce Oil Co. v. Hopkins, 282 Fed. 253, a case from Arkansas, which held that a gasoline tax law requiring dealers to collect one cent a gallon for each gallon of gasoline sold, imposed a tax on the seller, and the Kentucky Court distinguishes the Pierce case because the Arkansas Statute imposed upon the seller a personal obligation to pay the levied tax whether he collected it from the purchaser or not. The Court in the Pierce Oil Co. case said:

"It is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. * * * The seller is required to register and to file a report of his sales and show therein 'the amount of tax due [fol. 19] by said seller.' The seller must pay the tax unless he collects the amount from the purchaser. * * * The penalties provided in the act are all levelled against the seller."

The Colorado Act makes the seller of the services personally liable to the state and prescribes severe penalties to be enforced against the seller.

In Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. Ed. 857, the Court held the United States not liable to pay a gasoline tax. The Mississippi law required persons engaged in selling gasoline to pay one cent per gallon of gasoline sold for the privilege of engaging in the business. The retailer was the taxpayer. The Court said:

"The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital."

The answer of defendant alleges facts, admitted by the demurrer, from which the conclusion must follow that the defendant is a governmental agency or instrumentality, and that the services performed by it in operating depositories are an incident to and integral part of its banking business. Considering the provisions of the Service Tax Act, it seems certain that as to services rendered by the Bank for which it does not collect the tax, the Bank is the taxpayer. The state looks only to the Bank to receive the amount of tax, whether collected or not. The Act is so drawn that it makes no distinction, so far as liability of those performing services is concerned, between taxes collected by the Bank from its customers and taxes due the state that are not collected. Even though, strictly speaking, the Bank may be only the agent of the state and a [fol. 20] trustee as to money in its hands collected as taxes from the purchasers of the services, still the Act imposes upon it burdens with reference to taxes which it must discharge for the privilege of doing business and performing the services.

The burdens imposed upon the Bank by the Act, in my judgment, constitute an interference with the proper functions of a governmental agency and impair the efficiency of the Bank to discharge the duties for the performance of which it was created.

The demurrer to the answer is overruled.

It is the judgment and declaration of the Court that the services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the service tax law of Colorado.

Plaintiff's exceptions are noted. Stay of execution for thirty (30) days is allowed, and plaintiff may have time and until sixty (60) days within which to prepare, tender and have settled a bill of exceptions.

Motion for new trial is dispensed with.

Done and signed in open court this 9th day of June, A. D. 1938.

By the Court.

Robert W. Steele, Judge.

First Declaratory Decree and Judgment—June 23, 1938

[fol. 21] This cause coming on to be heard, upon its merits, upon plaintiff's amended petition for declaratory judgment and his amendment to paragraph VII thereof, upon the defendant's answer thereto, upon plaintiff's demurrer to the said answer, and upon the stipulation of the parties, dated May 9, 1938, filed herein; the plaintiff appearing by his attorneys, Byron G. Rogers, Attorney General, and Elmer P. Cogburn, Assistant Attorney General, and the defendant appearing by its attorneys, Walter W. Blood, and Bartels, Blood and Bancroft; and the said attorneys having argued this cause; and the Court having taken it under advisement and having been fully advised in the premises and having on June 9, 1938, rendered and filed a memorandum opinion herein (reference to which is hereby made and which by reference is hereby made a part hereof);

The Court doth Find, and Conclude as a Matter of Law

That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults are incident to, and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937 (Session Laws of Colorado 1937, Chapter 240), the defendant Bank as the one rendering or performing such services would be the taxpayer, or, if not, would be burdened by such a tax; and that, therefore, the said services are by Section 7 of the said Act expressly exempt from taxation under it [fol. 22] as "services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado"; and that, accordingly, the plaintiff's demurrer to the defendant's answer should be overruled, and the Court should order, adjudge, decree and declare as hereinafter stated;

Now, Therefore, It is hereby Ordered:

That the demurrer of the plaintiff, Homer F. Bedford, Treasurer as aforesaid, to the said answer of the defend-

ant, The Colorado National Bank of Denver, shall be and is hereby overruled;

And the plaintiff having elected to stand upon the ruling of the Court upon the said demurrer, pursuant to the said stipulation on file herein;

Now, Therefore, the Court doth further Order, Decree, Declare and Adjudge:

1. That all services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the said service tax law of Colorado; and

2. That the defendant do have and recover of and from the plaintiff its costs in this cause expended.

Done in open court this 23rd day of June, 1938, nunc-pro-tunc as of June 9, 1938.

By the Court:

Robert W. Steele, Judge.

[fol. 23] IN SUPREME COURT OF COLORADO

No. 14405

WRIT OF ERROR—Filed July 1, 1938

THE PEOPLE OF THE STATE OF COLORADO:

To the Clerk of the District Court of the City and County of Denver, State of Colorado, Greeting:

Because in the record and proceedings, as also in the judgment, in a suit which was lately in the District Court of the City and County of Denver, Colorado, between Homer F. Bedford as Treasurer of State of Colorado, Plaintiff; and The Denver Safe Deposit Company, et al., Defendants, manifest error hath intervened to the great injury of the said plaintiff, as we are informed, and we being willing that said error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You that when prepared as provided by the rules of our Supreme Court, you send to the Justices of our said Court at Denver, in said State, under the seal of your Court, with all convenient dispatch, the record on error containing a statement of so much of the

pleadings, proceedings and evidence, or other matters in this action, as may be necessary to present the errors complained of, together with this writ, so that the said Justices may have them at the place of holding the said Supreme Court, in Denver, twenty days from this date, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon, for correcting that error what, of right, according to law and the rules of said Court, ought to be done.

Witness the Honorable H. P. Burke, Chief Justice of our Supreme Court, and the seal thereof, affixed at my office in the City of Denver, this 1st day of July, A. D. 1938. A. H. White, Clerk of the Supreme Court, by C. W. Sheafor, Deputy Clerk. (Supreme Court Seal.)

[fol. 24] IN SUPREME COURT OF COLORADO

No. 14405

HOMER F. BEDFORD, as Treasurer of the State of Colorado, Plaintiff in Error,

v.

THE COLORADO NATIONAL BANK, a Banking Corporation, Defendant in error

Error to the District Court of the City and County of Denver

JUDGMENT AND DECISION—December 27, 1938

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and the Court being now equally divided, said judgment stands affirmed by operation of law.

It is further ordered that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court, in the cause, notwithstanding the said writ of error.

Exhibit C

Colorado Supreme Court Decision of Affirmance of December 27, 1938

Mr. Justice Holland does not participate in the consideration of this cause. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Knous think the judgment should be [fol. 25] affirmed, while Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke think it should be reversed. The court being "equally divided in opinion, the judgment of the court below shall stand affirmed." Code of Civil Procedure Sec. 439.

In Supreme Court of Colorado

No. 14405

Order Granting Rehearing—January 16, 1939

The Court having considered the petition for a rehearing of this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, granted, the opinion of the court withdrawn and the judgment thereon vacated and set aside.

In Supreme Court of Colorado

Opinion—April 17, 1939

This action was brought by plaintiff in error under the Uniform Declaratory Judgments Act, '35 C. S. A., chapter 93, sections 78-92, to obtain a judicial declaration that the state has the power to compel national banks to collect and remit service taxes upon depository services performed by such banks to the public, in compliance with the Public Revenue Service Tax Act of 1937 (S. L. '37, c. 240).

Upon the filing of an amended petition defendant in error answered, to which answer plaintiff in error demurred. The demurrer was overruled. It was previously agreed that the party against whom the ruling on demurrer was made would stand upon such ruling. Plaintiff in error made that selection and the court decreed, "That all services performed by defendant in operating safety deposit boxes and

[fol. 26] vaults are exempt from taxation" under the Public Revenue Service Tax Act, supra. Reversal of that decree is sought here, and the assignment of errors, in substance, raise two questions, namely: (1) Upon whom is the service tax imposed, the party rendering the service or the one who uses it? (2) Does the requirement to collect and remit the tax upon depository services constitute a burden upon, or an interference with, the proper functions of a national bank as a governmental agency?

Reference will hereinafter be made to plaintiff in error as treasurer and to defendant in error as the bank.

It may be conceded that if the bank is the party upon which the tax is solely imposed, then the act as to national banks would be contrary to the federal statutes (U. S. Revised Statutes, section 5219; U. S. C. A. Title 12, section 548), and invalid. The pertinent provisions are:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

[fol. 27] This section was intended to protect capital invested in national banks from unfriendly discrimination by the states in the exercise of the taxing power. Adams v. Nashville (Tenn. 1877), 95 U. S. 19, 30, 24 L. Ed. 369; Mercantile National Bank v. City of New York (C. C. N. Y. 1886), 28 F. 776 (affirmed 1887), 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; Roberts v. American National Bank of Pensacola (1929), 97 Fla. 411, 121 So. 554; Des Moines National Bank v. Fairweather (Iowa, 1923), 263 U. S. 103, 106, 44 Sup. Ct. 23, 68 L. Ed. 191; Minnehaha National Bank v. Anderson (Dist. Ct., S. D. 1924), 2 F. (2d) 897.

It heretofore has been determined that a state can only tax a national bank with the consent of Congress and not

otherwise. First National Bank v. Anderson, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. Ed. 295, and numerous other authorities. Section 5219, supra, furnishes the exclusive authority governing state taxation as to national banks. Bank of California v. Richardson, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372.

Whether this principle of implied constitutional immunity from the taxation of national banks has been modified, when a nondiscriminatory tax is levied on the safety deposit box service performed by such banks, by recent opinions of the Supreme Court of the United States in Graves v. People, ex rel., 59 Sup. Ct. 595, 83 L. Ed. 577, and in State Tax Commission v. Van Cott, 59 Sup. Ct. 605, 83 L. Ed. 588, is not necessary for us to determine. According to the views therein expressed, the trend is definitely to narrow implied constitutional inter-governmental immunity.

Before discussing the assignment of errors, we direct our attention to section 4 (a) of our service tax act, which pro- [fol. 28] vides, in effect, that a bank must procure a license to conduct a safety deposit box business, and conducting such a business without procuring the necessary license constitutes a misdemeanor. Excepted from this provision are persons who hold licenses under any other statute and those performing services of a professional, technical or scientific nature. It is conceded that the bank is authorized under its federal charter to do a safety deposit box business. The state, therefore, cannot require it to take out this license or collect the fee therefor from the bank. Bank of California v. Portland, 157 Ore. 203, 69 P. (2d) 273, 275; Austin v. Seattle, 176 Wash. 654, 30 P. (2d) 646; City of Shelbyville v. Citizens Bank of Shelbyville, 114 S. W. (2d) 719. Section 4 (a), supra, does not contemplate the licensing or collection of the fee therefor from all persons performing and collecting taxable services under the act. In so far as this section is concerned, if applied to national banks, it would, under the above authorities, be invalid. No attempt is made in the instant case to enforce it. In fact, the treasurer says that no license fees are demanded from the bank. The validity of this section of the act, however, does not affect other portions thereof as applied to the bank. Section 22 declares it as the legislative intent that it would have passed the act irrespective of the fact that any one or more sections be declared invalid. It may be assumed, therefore, that the bank is not required to comply with section 4 (a) of the act.

Our first concern under the assignment of errors is whether the service tax involved here is imposed upon the bank and whether it bears this tax burden. We think not.

In our determination of this question it is necessary that [fol. 29] we quote certain pertinent portions of the act, as follows:

"Section 2. (c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter designated and defined, when said act or service is rendered, *furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.*

* * * * * * *

"(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act.

"(f) The term 'tax' means *either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax,* or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

* * * * * * *

"(h) * * * taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon [fol. 30] a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amount so collected.

"Section 5. From and after the effective date of this act there is hereby *levied and imposed upon the services specified in this act and measured by the amount paid* therefor and there shall be collected and paid:

* * * * * * *

"(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: * * * banks, finance companies, trust companies and depositories, * * *.

"Section 6. Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon the total taxable services rendered or performed, and shall before the fifteenth day of each month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, *less three (3) per cent thereof to cover the expense of the person rendering or performing services in the collection and remittance of said tax.* • • •

"(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or [fol. 31] charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

• • • • • • •

"(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the public or to any user, directly or indirectly, *that the tax or any part thereof imposed by this act will be assumed or absorbed by him* or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"Section 7. All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States government, to the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to religious, charitable and eleemosynary corporations, in the conduct of the regular religious, charitable or eleemosynary functions and activities and all services rendered or performed to or by educational institutions, directly under the super- [fol. 32] vision and control of a religious sect or denomination in the conduct of the regular educational functions and

activities, and all *services rendered or performed which the state of Colorado is prohibited from taxing under the Constitution or laws of the United States,* or the state of Colorado, *shall be exempt from taxation under this act;* provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to whether or not any services rendered or performed is exempt from taxation hereunder, nevertheless the person rendering or performing services shall collect and the user shall pay such tax, and the person rendering or performing services shall thereupon issue to the user a receipt or certificate on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; *provided* further that a refund shall be made, or a credit allowed, for the tax so paid under dispute by any user who has an exemption as in this act provided. Such refund shall be made by the state treasurer after compliance with the following conditions precedent:

[fol. 33] "Applications for refund must be made within sixty (60 days after the rendering or performance of services whereon an exemption is claimed and must be supported by the affidavit of the user accompanied by the original paid invoice, receipt and certificate issued by the person rendering or performing services, and be made upon such forms as shall be prescribed and furnished by the state treasurer, which forms shall contain such information as said state treasurer shall prescribe. Upon receipt of such application the treasurer shall examine same with all due speed and shall give notice to the applicant by order in writing of his decision thereon. Aggrieved applicants may, within ten (10) days after such decision is mailed to them, petition the treasurer for a hearing on the claim in the manner provided in this act. The right of any person to a refund under this article shall not be assignable and such application for refund must be made by the same person who paid the tax thereon as shown in the invoice, receipt or certificate."

"Section 12. All sums of money paid by the user to the person rendering or performing services as taxes imposed by this act shall be and remain public money, the property of the state of Colorado, in the hands of such person rendering or performing services and he *shall hold the same in trust for the sole use and benefit of the state of Colorado until* paid to the state treasurer as herein provided, and for failure to so pay to the state treasurer, such person ren-
[fol. 34] dering or performing services may be punished as provided by law." (All italics ours.)

The legislative intent seems to be clear, i. e., to impose a tax upon the user of the service. The levy is "imposed upon the services specified in this act." In holding that this is a tax upon the user, we are fortified by a number of authorities construing similar acts. In fact, the great weight of authority is definitely in that direction.

Breaux Ballard v. Shannon, 271 Ky. 553, 112 S. W. (2d) 996;
Covington v. Tax Commission, 257 Ky. 84, 77 S. W. (2d) 386;
Wiseman v. Phillips, 191 Ark. 63, 84 S. W. (2d) 91;
Morrow v. Henneford, 182 Wash. 625, 47 P. (2d) 1016;
School District v. Smith (Mo.), 111 S. W. (2d) 167;
Long v. Roberts & Son, 234 Ala. 570, 176 So. 213.

In construing a similar act (Sales Tax Act, chapter 144, '35 C. S. A.), we have recently held that the sales tax involved is not imposed upon the dealer; that he is merely the state's agent to collect and he is compensated for that service. Bedford v. Hartman Brothers, Inc., 104 Colo. 190, 89 P. (2d) 584.

In the instant case the direct tax burden is not upon the bank. It is the state's agent to collect and it is compensated for that service. The tax when collected by the bank is the property of the state, which it holds in trust for the sole use and benefit of the state until paid to the treasurer as provided by law. While the bank is liable to the state for the tax, the act itself is so worded that the bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank, it is a "taxpayer" within the meaning of section 2 (e), supra, and the liability is a "tax" within the mean-
[fol. 35] ing of section 2 (f), supra.

The second question under the assignment of errors requires us to answer whether the duties imposed upon national banks by the terms of the act, requiring them to collect and remit the tax upon their safety deposit box service, constitutes a burden upon or an interference with the proper functions of a national bank as a governmental agency. This also involves the exemption in section 7, supra, upon which the bank relies. That a national bank is a governmental agency and therefore an instrumentality through which the government performs certain fiscal functions cannot be questioned. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579. The national bank system was devised, primarily, to provide a national currency, secured by a pledge of United States bonds, and they are agencies or instruments of the government for that purpose. Davis v. Elmira Savings Bank, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700. Their powers are defined and limited by the acts of Congress. Federal Intermediate Credit Bank v. L'Herisson, 33 F. (2d) 841.

There is no congressional requirement that a national bank conduct a safety deposit box service. The relationship created under such service is that of bailor and bailee and not that of debtor and creditor. Tuckerman v. Mearns, 262 F. 607. A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business.

Under Title 12, U. S. C. A., section 24, it is provided, "That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of [fol. 36] any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus." This would indicate that a national bank may conduct a safety deposit box business under a separate state organization, with limitations.

Section 5228, United States Revised Statutes, title 12, U. S. C. A., section 133, prohibits national banks from continuing business after notice by the comptroller of default, "except to receive and safely keep money belonging to it, and to deliver special deposits." National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750. From this it may be inferred that safety deposit box service is clearly separable from the

banking business as a governmental instrumentality under the federal law.

Counsel for plaintiff in error place great reliance upon the case of Bank of California v. Portland, supra. That case involved only authority of the city to require a license and payment of a fee therefor by banks conducting a business of "safe-deposit vault." Much said in that case concerning the power of national banks to conduct safety deposit vaults is merely obiter dicta. We already have indicated that we are not here concerned with the imposition of license fees on banks which conduct a safety deposit box business. We are in agreement with the conclusions announced in the Portland case.

That the tax involved in the instant case is non-discriminatory cannot be questioned. It applies to all banks, state and national, and to any person conducting a safety deposit [fol. 37] box business, independent of banking operations. We do not disagree with cases which hold that the receiving of special deposits is a power incidental to the business of banking. What we do say is, that it is not a necessary power to the conduct of a banking business, the absence of which would prevent the bank from discharging its duties to the government. In other words, there is nothing in the service tax act that would burden the bank, as a governmental instrumentality, in conducting its banking business. In re Leavy, 85 F. (2d) 25. How, we may ask, do the requirements of the service tax act interfere with any powers of the bank or burden its governmental activities? Every law, state or national, controlling banks, implies a restraint, but is the restrain involved here such a burden upon national banks as would impair their operations as governmental agencies?

In McClellan v. Chipman, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461, Mr. Justice White, commenting upon the relationship between state and federal laws, as applied to national banks, quotes from National Bank v. Commonwealth, 9 Wall. 353, 362, as follows:

"National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are

based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' "

[fol. 38] There is nothing in the service tax act which incapacitates the bank from discharging its duties to the government. That, after all, is the test: whether there is any unconstitutional interference with the operations of, or burden imposed upon, the bank by the applicable provisions of the act.

Mr. Chief Justice Hughes, in the recent case of James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 58 Sup. Ct. 208, discusses the validity of a state income tax imposed by the state of West Virginia upon the gross receipts of the Bravo Company under contracts with the United States, as follows:

"Second. Is the tax invalid upon the ground that it lays a direct burden upon the federal government? The Solicotor General, speaking for the government, supports the contention of the state that the tax is valid. Respondent urges the contrary.

"The tax is not laid upon the government, its property or officers. Dobbins v. Commissioners, 16 Pet. 435, 499, 450.

"The tax is not laid upon an instrumentality of the government. [Citing cases.] Respondent is an independent contractor. The tax is non-discriminatory.

"The tax is not laid upon the contract of the government. [Citing cases.] The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom [fol. 39] of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Mere operation of safety deposit vaults by a national bank does not, in itself, involve a governmental relation with the federal government. In fact, recent federal authorities give basis for the belief that even if the service tax were imposed upon the bank, under the circumstances in the instant case, it would not be an interference with any instrumentality of the government and would be valid. It is not necessary for us to, and we do not, pass upon that question.

Counsel for the bank argue that the creation of a first and prior lien upon it (see section 11, Service Act) in the event of its failure to collect and pay, imposes a direct burden upon it as a federal instrumentality. Whether or not this contention is well founded is not an issue in the instant case. We leave that question open. The act is enforceable without the creation of this lien as applied to a national bank.

We conclude, that the tax created by the service tax act is imposed, not upon the bank but upon the user of the service, and that the requirement that the bank collect and pay the same to the treasurer, under the circumstances detailed in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the bank as a governmental instrumentality. The constitutional immunity claimed by the bank does not apply.

In view of our conclusion, we do not discuss other questions raised.

[fol. 40] The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the answer of the bank, and for further proceedings according to law.

Mr. Justice Burke and Mr. Justice Knous dissent.

Mr. Justice Francis E. Bouck not participating.

IN SUPREME COURT OF COLORADO

No. 14405

JUDGMENT—April 17, 1939

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause

be remanded to said District Court which is directed to sustain the demurrer to the answer of the bank, and for further proceedings according to law.

IN SUPREME COURT OF COLORADO

No. 14405

REMITTITUR

The said cause was carried to the Supreme Court of the State of Colorado on writ of error, by Homer F. Bedford, Treasurer, in a cause there numbered 14405, resulting in a reversal of the foregoing judgment of the District Court, [fol. 41] and in a decision and opinion reported in 104 Colo. 311, 91 Pac. (2d) 469, and on June 14, 1939, a remittutur issued from the said Supreme Court to the District Court of the City and County of Denver and State of Colorado, reading as follows:

Whereas, lately in the District Court of the City and County of Denver, state aforesaid, in a certain cause therein pending between Homer F. Bedford, as Treasurer of the State of Colorado, plaintiff, and The Denver Safe Deposit Company et al., defendants, the judgment of said District Court in said cause rendered was against the said plaintiff.

And Whereas, the said cause was brought into our Supreme Court of the State of Colorado, by writ of error to said District Court.

And Thereas, at the April Term of our Supreme Court, in the year of our Lord one thousand nine hundred and thirty-nine, the said cause came on to be heard before our said Supreme Court on the 17th day of April, A. D. 1939 (the same being one of the juridical days of said term), and the following proceedings were had and entered of record in said cause, to-wit:

No. 14405

"HOMER F. BEDFORD, as Treasurer of the State of Colorado, Plaintiff in Error,

vs.

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association, Defendant in Error

This cause having been brought to this Court by writ of [fol. 42] error to review the judgment of the District Court

of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause be remanded to said District Court which is directed to sustain the demurrer to the answer of the Bank, and for further proceedings according to law.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

Witness the Honorable Benjamin C. Hilliard, Chief Justice of our Supreme Court and the seal thereof, affixed at my office in the City of Denver, this 14th day of June, A. D. 1939.

A. H. White, Clerk Supreme Court, by O. E. Rickerson, Deputy."

In District Court of City and County of Denver

Defendant's Bill of Exceptions

On September 12, 1939, the cause again came on for hearing in the said District Court, pursuant to the said remittitur.

The Court then entered an order vacating, setting aside and holding for naught its former order overruling the [fol. 43] plaintiff's demurrer to defendant's answer, and the defendant excepted.

It also entered an order vacating, setting aside and holding for naught the said first judgment and decree, and the defendant excepted.

It also entered an order sustaining the plaintiff's demurrer to the defendant's answer, and the defendant excepted; and elected to stand upon its answer and declined to plead further. The plaintiff then tendered to the Court a judgment and decree and requested that the same be signed,

entered and filed; and the defendant thereupon tendered its written objections thereto. The Court overruled the said objections, signed the said judgment and decree, and the defendant excepted thereto for the reasons stated in its objections.

Objections of the Defendant to the Presented Declaratory Judgment and Decree

The said objections and exceptions are as follows:

The Colorado National Bank of Denver, defendant above named, by its attorneys, objects to the entry of the presented judgment and decree for the following reasons, to-wit:

I

That by the said judgment and decree the Court will decide this cause in favor of the validity of the Colorado Public Revenue Service Tax Act when, in law, the said Act is repugnant to the Constitution and laws of the United States insofar as the said Act affects the defendant Bank.

II

That it will deny to the defendant Bank rights, privileges and immunities specially set up in the answer of the defendant Bank and in its arguments, and claimed by it under the [fol. 44] Constitution, statutes of, and authority exercised under, the United States.

III

That the said judgment and decree, and the findings and conclusions therein made, are contrary to the law, and to the material facts pleaded and admitted by the said demurrer, in each and all of the following particulars, to-wit:

(1) In holding that the defendant Bank's operation of its safety deposit vaults, as described in its answer, and admitted by the said demurrer, is "aside from and outside its regular business" as a national bank.

(2) In holding that the said services performed by the defendant Bank are not within the exemption of Section 7 of the said Act, providing that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or the laws of the United

States * * * shall be exempt from taxation under this Act."

(3) In holding that the said Act does not violate the Acts of Congress of the United States, and particularly U. S. R. S., Sec. 5219, as amended (U. S. C. A. Title 12, Sec. 548).

(4) In determining and holding that the tax on the defendant Bank's depository services is imposed on the user of the said services, and not on the defendant Bank, and, notwithstanding this, in further determining and holding that the Bank is responsible or liable for the said tax on its said services, whether or not it collects the amount thereof from the users of its said services.

(5) In holding that the said Act, in requiring the defendant Bank to collect the said tax on its said services, and, whether or not collected, to pay the same to the State Treasurer, and otherwise to be subjected to all burdens, [fol. 45] liabilities, fines and penalties provided in the said Act, does not impose an unconstitutional or unlawful burden upon or interference with the defendant Bank as a Governmental Agency or instrumentality.

(6) In holding that Section 10 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(7) In holding that Section 27 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(8) In holding that the plaintiff Treasurer need not apply the said Act so as to exempt the defendant Bank, as a Federal Agency or instrumentality, from the said tax, when, as shown by his other rulings, regulations and interpretations of the said Act, he so applies it as to exempt all other Federal Agencies and instrumentalities from the said tax; and in this respect his said application of the said Act amounts to an unlawful discrimination repugnant to the Fourteenth Amendment of the Constitution of the United States, and also to the Constitution of the State of Colorado.

(9) In holding that the said Act may, without the acquiescence or consent of the defendant Bank, conscript it as an agent of the state to collect and remit the said tax on any part of its banking services, or else to be subjected

to the burdens, liabilities, fines and penalties which the Act imposes.

IV

That the said judgment and decree, if entered, will result in a decision repugnant to the Acts of Congress, relating to national banks, adopted pursuant to the Governmental powers conferred upon the Congress by the United States Constitution, and particularly Article I, Section 8, thereof.

[fol. 46]

V

That the said judgment and decree, if entered, will result in a decision repugnant to each and all of the following Constitutional provisions (national and state) to-wit:

From the United States Constitution and Amendments:

Art. I, Sec. 10. "No state shall * * * pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

From the Colorado Constitution:

Art. II, Sec. 15. "Private property shall not be taken * * * for public or private use without just compensation."

Art. II, Sec. 25. "No person shall be deprived of life, liberty or property without due process of law."

Art. II, Sec. 26. "There shall never be in this state * * * involuntary servitude except as punishment for a crime, whereof the party shall have been duly convicted."

Art. XII, Sec. 2. "No person shall hold any * * * em-
[fol. 47] ployment of trust * * * under the laws of the State * * * without devoting his personal attention to the duties of the same."

IN DISTRICT COURT OF CITY AND COUNTY OF DENVER

SECOND DECLARATORY JUDGMENT AND DECREE—September 12, 1939

This cause coming on to be heard, upon its merits, upon plaintiff's amended petition for declaratory judgment and his amendment to paragraph VII thereof, upon the defendant's answer thereto, upon plaintiff's demurrer to the said answer upon the sustaining of the said demurrer, upon the stipulation of the parties to stand on the ruling on the demurrer to defendant's answer, dated and filed herein on May 9, 1938, and also upon the remittitur from the Supreme Court of the State of Colorado in the cause therein entitled "Homer F. Bedford, as Treasurer of the State of Colorado, Plaintiff in Error v. The Colorado National Bank, a Banking Corporation, Defendant in Error," and numbered 14405, and the opinion rendered in the said cause on April 17, 1939, reversing the order overruling the demurrer to the answer and reversing the judgment entered accordingly; and plaintiff appearing by his attorneys, Byron G. Rogers, Attorney General, and Elmer P. Cogburn, Assistant Attorney General, and the defendant appearing by its attorneys, Walter W. Blood, and Bartels, Blood and Bancroft; and the Court having fully considered all of the foregoing and being now sufficiently advised in the premises;

The Court doth find and conclude as a matter of law:

That the defendant is a national banking association organized and existing under and by virtue of the Acts of Congress of the United States of America, and as such is [fol. 48] an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults do not involve any governmental relation with the United States; that the service tax imposed by the Colorado Public Revenue Service Tax Act of 1937 (S. L. of Colo. 1937, Ch. 240, as readopted, extended and amended by House Bill No. 352, adopted by the General Assembly of the State of Colorado and ap-

proved May 1, 1939), as applied to the depository services performed by the defendant Bank, is not an unlawful interference with an instrumentality of the United States; that the following quoted paragraphs or sections numbered 10 and 27 of the rules, regulations and interpretations, prescribed and published pursuant to the said Act by the plaintiff on or about June 10, 1937, and republished, as amended, on October 22, 1937, with respect to depository services performed by the defendant Bank, are proper and valid:

"10. Banks. Services rendered or performed by Banks were included in the Act. It now appears that the law is invalid as applied to National Banks.

Following the general principle of law and taxation now established, to the effect that where a tax statute intended to apply statewide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside [fol. 49] services are taxable and the bank must collect and remit the tax thereon."

"27. Depositories. Such services rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor." that the said depository services performed by the defendant Bank are not exempt from the application of the said Act under the provisions of Section 7 thereof; that the tax created by the Service Tax Act is imposed, not upon the Bank, but upon the user of the service, and does not violate U. S. Revised Statutes, Section 5219; U. S. C. A. Title 12, Section 548; and that the requirement that the Bank collect and pay the same to the State Treasurer, in the manner provided in the Act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the Bank as a governmental instrumentality; and accordingly, the Court should now order, adjudge, decree and declare the law as hereinafter stated;

Now, Therefore, the Court Doth Order, that the order heretofore entered herein overruling the demurrer of plain-

tiff to defendant's answer and the judgment and decree thereupon rendered and entered herein be, and they hereby are, vacated and set aside, and the said demurrer of plaintiff to defendant's answer be, and hereby is, sustained; and

It Is Decreed, Declared and Adjudged:

1. That the services performed by the defendant Bank in operating safety deposit boxes and vaults, as described in the pleadings herein, are not exempt from taxation under the said Service Tax Act of Colorado; that the said services are taxable pursuant to the terms of the said Act. [fol. 50] and within the provision of the said Act governing depositories, and are within the said paragraphs or sections numbered 10 and 27 of the said rules, regulations and interpretations, and they, as well as the said Act, relating to the said depository services, are proper and valid, in all respects, as to the duties, burdens, responsibilities, liabilities, fines and penalties imposed upon the Bank, in performing the said depository services, to collect and account for, and to pay the said tax.

Done in open court this 12th day of September, 1939.
By the Court.

Robert W. Steele, Judge.

In Supreme Court of Colorado

No. 14684

Writ of Error—Filed November 7, 1939

The People of the State of Colorado to the Clerk of the District Court of the City and County of Denver, State of Colorado, Greeting:

Because in the record and proceedings, as also in the judgment, in a suit which was lately in the District Court of the City and County of Denver, Colorado, between Homer F. Bedford, as Treasurer of the State of Colorado, Plaintiff, and The Denver Safe Deposit Company, a Corporation, et al., Defendants, manifest error hath intervened to the great injury of The Colorado National Bank of Denver, a National Banking Association, as we are informed, and we being willing that said error, if any there be, should [fol. 51] in due manner be corrected, and full and speedy

justice done to the parties aforesaid in this behalf, Do Command You that when prepared as provided by the rules of our Supreme Court, you send to the Justices of our said Court at Denver, in said State, under the seal of your Court, with all convenient dispatch, the record on error containing a statement of so much of the pleadings, proceedings and evidence, or other matters in this action, as may be necessary to present the errors complained of, together with this writ, so that the said Justices may have them at the place of holding the said Supreme Court, in Denver, twenty days from this date, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon, for correcting that error what, of right, according to law and the rules of said Court, ought to be done.

Witness the Honorable Benjamin C. Hilliard, Chief Justice of our Supreme Court, and the seal thereof, affixed at my office in the City of Denver, this 7th day of October, A. D. 1939.

A. H. White, Clerk of the Supreme Court, by O. E. Rickerson, Deputy Clerk. (Supreme Court Seal.)

IN SUPREME COURT OF COLORADO

No. 14684

ASSIGNMENTS OF ERROR—Filed November 7, 1939

Now comes The Colorado National Bank of Denver, plaintiff in error, and for an assignment of errors respectfully shows the Court and avers that upon the record and in [fol. 52] the proceedings in the above entitled cause, in the Court below, there were manifest and material errors in the following, to-wit:

I

That by the final declaratory judgment and decree rendered and entered, the Court decided this cause in favor of the validity of the Colorado Public Revenue Service Tax Act when, in law, the said Act is repugnant to the Constitution and laws of the United States insofar as the said Act affects a national bank.

II

That the said final declaratory judgment and decree denies to the plaintiff in error Bank rights, privileges and im-

munities specially set up in its answer and in its arguments, and claimed by it under the Constitution and statutes of the United States and its authority exercised under the United States.

III

That the said judgment and decree, and the findings and conclusions therein made, are contrary to the law, and to the material facts pleaded and admitted by the demurrer of the defendant in error, Treasurer, to the Bank's answer to the amended petition for a declaratory judgment, in each and all of the following particulars, to-wit:

(1) In holding that the Bank's operation of its safety deposit vaults, as described in its answer, and admitted by the said demurrer, is "aside from and outside its regular business" as a national bank.

(2) In holding that the said services performed by the Bank are not within the exemption of Section 7 of the said [fol. 53] Act, providing that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or the laws of the United States * * * shall be exempt from taxation under this Act."

(3) In holding that the said Act does not violate the Acts of Congress of the United States, and particularly U. S. R. S., Sec. 5219, as amended (U. S. C. A. Title 12, Sec. 548).

(4) In determining and holding that the tax on the Bank's depository services is imposed on the user of the said services, and not on the Bank, and, notwithstanding this, in further determining and holding that the Bank is responsible or liable for the said tax on its said services, whether or not it collects the amount thereof from the users of its said services.

(5) In holding that the said Act, in requiring the Bank to collect the said tax on its said services, and, whether or not collected, to pay the same to the State Treasurer, and otherwise to be subjected to all burdens, liabilities, fines and penalties provided in the said Act, does not impose an unconstitional or unlawful burden upon or interference with the Bank as a Governmental Agency or instrumentality.

(6) In holding that Sec. 10 of the Rules, Regulations and Interpretations recited in the said decree is proper and valid.

(7) In holding that Sec. 27 of the Rules, Regulations and Interpretations recited in the said decree is proper and valid.

(8) In holding that the State Treasurer need not apply the said Act so as to exempt the Bank, as a Federal Agency or instrumentality, from the said tax, when, as shown by his other rulings, regulations and interpretations of the said Act, he so applies it as to exempt all other Federal Agencies [fol. 54] and instrumentalities from the said tax; and in this respect his said application of the said Act amounts to an unlawful discrimination repugnant to the Fourteenth Amendment of the Constitution of the United States, and also to the Constitution of the State of Colorado.

(9) In holding that the said Act may, without the acquiescence or consent of the Bank, conscript it as an agent of the state to collect and remit the said tax on any part of its banking services, or else to be subjected to the burdens, liabilities, fines and penalties which the Act imposes.

IV

That the said judgment and decree results in a decision repugnant to the Acts of Congress, relating to national banks, adopted pursuant to the governmental powers conferred upon the Congress by the United States Constitution, and particularly Art. 1, Sec. 8, thereof.

V

That the said judgment and decree results in a decision repugnant to each and all of the following Constitutional provisions (national and state), to-wit:

From the United States Constitution and Amendments:

Art. 1, Sec. 10. "No state shall * * * pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor [fol. 55] involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

From the Colorado Constitution:

Art. II, Sec. 15. "Private property shall not be taken * * * for public or private use without just compensation."

Art. II, Sec. 25. "No person shall be deprived of life, liberty or property without due process of law."

Art. II, Sec. 26. "There shall never be in this state * * * involuntary servitude except as punishment for a crime, whereof the party shall have been duly convicted."

Art. XII, Sec. 2. "No person shall hold any * * * employment of trust * * * under the laws of the state * * * without devoting his personal attention to the duties of the same."

Walter W. Blood, Bartels, Blood and Bancroft, Attorneys for Plaintiff in Error.

IN SUPREME COURT OF COLORADO

No. 14684

DECISION—January 8, 1940

The issues presented in this case are in all respects identi- [fol. 56] cal with those raised in Bed ord, State Treasurer v. Colorado National Bank, 104 Colo. 311 (91 P. (2d) 469), in which our holding was adverse to the contentions advanced by plaintiff in error bank. Consistently with our conclusions therein announced, the judgment here under consideration is affirmed.

Mr. Justice Francis E. Bouck not participating.

IN SUPREME COURT OF COLORADO

No. 14684

JUDGMENT—January 8, 1940

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the

City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

IN SUPREME COURT OF COLORADO

No. 14684

STIPULATION RE WAIVER OF PETITION FOR REHEARING—Filed January 15, 1940

[fol. 57] It is hereby stipulated between the parties to the above entitled action by their respective attorneys as follows:

1. That the plaintiff in error may and does hereby waive the filing of any petition for rehearing of the judgment, decree, and opinion rendered and entered herein on January 8, 1940.

2. That the foregoing waiver is without prejudice to any right that the plaintiff in error may have to seek and procure a review in the Supreme Court of the United States of this cause, either by appeal or by writ of certiorari.

Dated at Denver, Colorado, January 15, 1940.

Walter W. Blood, Bartels, Blood & Bancroft, Attorneys for Plaintiff in Error. Byron G. Rogers, Attorney General, George K. Thomas, Assistant Attorney General, Elmer P. Cogburn, Assistant Attorney General, Attorneys for Defendant in Error.

IN SUPREME COURT OF COLORADO

No. 14684

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 17, 1940

The Colorado National Bank of Denver, the plaintiff in error above named, considering itself aggrieved by the final judgment or decree and decision rendered and entered on January 8, 1940, in the above entitled case, does hereby appeal from said order to the Supreme Court of the United [fol. 58] States, and prays that this, its appeal, may be allowed; that a transcript of those parts of the record material to and upon which the said judgment, decree, and decision was based, duly authenticated, may be sent to the Supreme Court of the United States; and that a proper order be made relating to the security to be required of the appellant.

Walter W. Blood, Frank N. Bancroft, Bartels, Blood & Bancroft, Attorneys for The Colorado National Bank of Denver, Appellant.

IN SUPREME COURT OF COLORADO

No. 14684

ASSIGNMENTS OF ERROR—Filed January 17, 1940

Now comes The Colorado National Bank of Denver, appellant, and makes and files this, its assignment of errors.

1. That the Supreme Court of the State of Colorado erred in affirming the judgment and decree of the District Court of the City and County of Denver, Colorado.

2. That the Supreme Court of the State of Colorado erred in holding that the Public Revenue Service Tax Act of 1937 (Session Laws of Colorado, 1939, Chapter 158) is valid and applicable to depository services rendered and performed by the appellant bank contrary to the bank's contentions that, as so applied, it is repugnant to the Constitution and laws of the United States, and the particular provisions of each thereof hereinafter cited.

[fol. 59] 3. That the Supreme Court of the State of Colorado erred in confirming, approving, and upholding rules, regulations, and interpretations adopted by the Treasurer of the State of Colorado, and particularly the provisions numbered 10 and 27, published June 10, 1937, and republished October 22, 1937, with reference to the said service tax act, to the effect that depository services performed by a national bank are not banking services, and on such erroneous premise upholding the said act, contrary to the Acts of Congress relating to national banks, and particularly Revised Statutes Section 5136 as amended (U. S. C. A. Title 12, Section 24), and the cases adjudicating them.

4. That the Supreme Court of the State of Colorado erred in holding, adjudging, and deciding contrary to the contentions of appellant, each and all of the following, to-wit:

(1) That, notwithstanding the Acts of Congress relating to national banks, and particularly Revised Statutes Section 5136 as amended, of the said acts, the business of the appellant national bank in operating its safe-deposit vaults and in conducting that business is "aside from and outside" its banking business.

(2) That, notwithstanding the Acts of Congress relating to state taxation of national banks and their business, and particularly Revised Statutes Section 5219 as amended, the State of Colorado may (and by the said service tax act does) tax safe-deposit services rendered by the appellant national bank, even though the said state has elected to tax and is taxing the appellant national bank on its net income, and its real property to the same extent as other real property is taxed.

(3) That the State of Colorado is not prohibited, under [fol. 60] the Constitution and laws of the United States, and particularly Article I, Section 8, Paragraph 18 of the Constitution, the Acts of Congress relating to national banks, and Revised Statutes Section 5219 as amended, and the Courts' decisions thereon applicable to national banks, from taxing safe-deposit services rendered or performed by the appellant national bank; and further, that the state is not prohibited from enforcing against the bank the said Colorado service tax act in each and all of the following particulars: to compel the bank to procure a license from

the state to conduct its said business, and to charge the amount of the said tax to, and to collect or attempt to collect it from the users of its said services; to be liable and responsible therefor to the state, whether collected or not; to keep its books and records and to account to the state, as the state might prescribe; and to suffer the rights of supervision, visitation, and fines and penalties, granted to the state in said act.

(4) That the said service tax act is "proper and valid, in all respects, as to the duties, burdens, fines and penalties imposed upon the bank, in performing the said depository services, to collect and account for and to pay the said tax," unless the bank, involuntarily and coerced by such threatened fines and penalties, acts as a tax collector for the state, as prescribed by the said act, for the compensation therein fixed of three per cent of the amount of the tax on such services, notwithstanding, and contrary to, Article I, Section 8, Paragraph 18 of the Constitution and to each and all of the following provisions of the United States Constitution and Amendments:

Art. 1, Sec. 10. "No state shall * * * pass any law [fol. 61] impairing the obligation of contracts."

Art. V of Amendments. "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

5. That the Supreme Court of the State of Colorado erred in not holding that the said service tax act is invalid in its application to safe-deposit services performed by the appellant national bank whether the appellant national bank be the taxpayer, or the user of such services be the taxpayer with the bank liable and responsible to pay such tax if it does not collect it in full from the user and pay the state the

amount of the tax (whether collected or not) upon such services less three per cent thereof.

6. That the Supreme Court of the State of Colorado erred in holding that the said service tax act is properly applicable and valid as to safe-deposit services performed by the appellant national bank, though not applicable to any of the bank's other services, thus improperly discriminating in taxation as to one part of the bank's services, without any warrant therefor in the law and contrary to Article V, and [fol. 62] to Article XIV, Section 1, of the Amendments of the United States Constitution.

Walter W. Blood, Frank N. Bancroft, Counsel for Appellant.

[fols. 63-82] IN SUPREME COURT OF COLORADO

No. 14684

ORDER ALLOWING APPEAL AND FIXING SECURITY FOR COSTS—January 17, 1940

The above named The Colorado National Bank of Denver, having prayed for the allowance of an appeal of this cause to the Supreme Court of the United States from the Judgment, decree, and decision rendered and entered in this cause by the Supreme Court of the State of Colorado on the 8th day of January, 1940, and having presented and filed its petition for appeal and an assignment of errors, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

It Is Now Here Ordered, That an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Colorado in the above entitled cause as provided by law, and that the Clerk of the Supreme Court of the State of Colorado shall certify a transcript of those parts of the record herein material to and upon which the said judgment, decree, and decision was based, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within sixty days from this date.

And It Is Further Ordered, That security for costs on appeal be fixed at the sum of $500.00.

Done at Denver, Colorado, this 17th day of January, 1940.

Benjamin C. Hilliard, Chief Justice of the Supreme Court of the State of Colorado.

[fol. 83] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed February 12, 1940

Now comes the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Colorado Public Revenue Service Tax Act of 1937, if applied to safe-deposit services performed by the appellant national bank, is repugnant to the Constitution and laws of the United States; and particularly so in that:

(a) If the bank is the taxpayer under the said act, it then contravenes Revised Statutes Section 5219 as amended, enacted by the Congress pursuant to the authority vested in it by the United States Constitution and Article I, Section 8 Paragraph 18 thereof.

(b) If the appellant national bank is not the payer of the tax levied and assessed by the said act upon its safe-deposit services, then the act imposes burdens, duties, liabilities, fines, and penalties upon the appellant national bank, and otherwise interfers with it, contrary to the Constitution of the United States, and contrary to the acts of Congress relating to national banks.

2. The operation by the appellant national bank of a safe-[fol. 84] deposit department is a part of its regular banking business under its charter granted pursuant to the acts of Congress; and the State of Colorado is, therefore, prohibited by the Constitution and laws of the United States from taxing its said safe-deposit services, as well as its other banking services and functions.

3. As construed and enforced by the Treasurer of the State of Colorado and the decision and judgment of the Colorado Supreme Court in this cause, the said Service Tax Act is discriminatory and contrary to the United States Constitution.

The appellant further states that the following parts of the record as filed in this Court need be printed by the Clerk for the consideration of this case:

1. The amended petition, as amended, for declaratory judgment, including therein the last amendment to paragraph VII thereof, in lieu of the prior paragraph VII;

2. The answer to the amended petition, as amended;

3. The stipulation of the parties to stand on their said pleadings and on the demurrer of the plaintiff to the said answer;

4. The demurrer of the plaintiff to the said answer;

5. The opinion of the District Court, Robert W. Steele, District Judge, dated June 9, 1938;

6. The first declaratory decree and judgment rendered in the District Court on June 23, 1938;

7. Writ of error in case numbered 14405 in the Supreme Court of the State of Colorado;

[fol. 85] 8. The judgment and decision of the Supreme Court of the State of Colorado rendered in case numbered 14405 on December 27, 1938;

9. The order entered by the Supreme Court of the State of Colorado in case numbered 14405 granting a rehearing from the said judgment and decision;

10. The opinion of the Supreme Court of the State of Colorado in case numbered 14405 rendered on April 17, 1939;

11. The judgment of the Supreme Court of the State of Colorado in case numbered 14405 entered pursuant to the said last opinion;

12. The remittitur from the Supreme Court of the State of Colorado in case numbered 14405;

13. The defendant's bill of exceptions as abstracted in case numbered 14684, including the objections of the defendant to the presented declaratory judgment and decree;

14. The second declaratory judgment and decree of the District Court entered September 12, 1939;

15. The writ of error in case numbered 14684;

16. The assignments of error in case numbered 14684;

17. The decision of the Supreme Court of the State of Colorado rendered in case numbered 14684 on January 8, 1940;

18. The judgment of the Supreme Court of the State of Colorado rendered in case numbered 14684, pursuant to the last said decision.

19. The stipulation of the parties dated January 15, 1940, in case numbered 14684;

20. The petition for appeal;

21. The assignment of errors upon appeal;

[fol. 86] 22. The prayer for reversal;

23. The order allowing the appeal;

24. This statement of points to be relied upon and designation of parts of record to be printed.

Walter W. Blood, Frank N. Bancroft, Counsel for Appellant.

The undersigned hereby acknowledge service upon the appellee above named of a copy of the foregoing at Denver, Colorado, this 17th day of January, 1940.

Byron G. Rogers, Attorney General; George K. Thomas, Assistant Attorney General; Elmer P. Cogburn, Assistant Attorney General, Counsel for Appellee.

[fol. 87] [File endorsement omitted.]

Endorsed on cover: File No. 44,126. Colorado Supreme Court. Term No. 719. The Colorado National Bank of Denver, Appellant, vs. Homer F. Bedford, as Treasurer of the State of Colorado. Filed February 12, 1940. Term No. 719, O. T., 1939.

(6618)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER,
Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

STATEMENT AS TO JURISDICTION.

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER, A NATIONAL BANKING ASSOCIATION,

Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO,

Appellee.

STATEMENT AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL.

Now comes the appellant above named, and states that the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment, decree, and decision in question, and matters pertinent thereto, are as follows:

I.

As to the Applicable Jurisdictional Act of Congress.

This appeal is brought under the Judicial Code, Section 237 as amended (U. S. C. A. Title 28, Section 344), wherein it

is provided that an appeal may be had to the Supreme Court of the United States from a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had (in this cause the Supreme Court of the State of Colorado), where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution or laws of the United States, and the decision is in favor of its validity.

The appellant firmly believes that the proper method of review in this cause is by an appeal. The case is of great importance, as a test case, for the guidance of the State Treasurer and of all national banks in Colorado. If, therefore, it should be determined that the appeal was improperly sought or allowed under the above Act of Congress, and that the proper method of invoking a review is by a petition for certiorari, then the appellant respectfully and earnestly urges that the papers whereon the appeal was allowed be regarded and acted on as a petition for certiorari.

II.

As to the Colorado Statute Drawn in Question.

The statute of the State of Colorado, the validity of which is involved, is the Colorado Public Revenue Service Tax Act of 1937, now found in Session Laws of Colorado, 1939, Chapter 158, the same being a reenactment, so far as applicable to this cause, of a similar statute of 1937 with the addition of enforcement provisions by distraint. Exhibit A hereto attached, and by this reference made a part hereof, sets out parts of the statute verbatim and appropriately summarizes its other pertinent provisions. Briefly, the said service tax act levies and imposes upon specified services a tax of two per cent of the amount paid for such services, or two per cent of the value thereof. Among the services taxed are "services rendered or performed by any person

engaged in any of the following businesses: * * * banks, finance companies; trust companies and depositories; * * * and any other business of a similar nature in which services (not professional) are performed on a price or fee basis." The act also provides that there shall be exempt from taxation under it "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States."

With reference to this exemption provision, the State Treasurer, by his rules, regulations and interpretations, held that the State is prohibited, by Federal authority, from taxing all services performed by national banks (as well as State), and all of their services are, therefore, exempt from taxation, except that safe-deposit services are not a banking function, and so are taxable.

By another provision of the act, the term "taxpayer" is defined to "mean any person obligated to account to the State Treasurer for the tax collected or to be collected or due the State under the terms of the act." By other provisions, also, one rendering or performing taxable services, among other things, is obligated: to procure a license to conduct his business; to make returns and account to the State Treasurer; to charge the user of services for the tax; and himself to pay the tax, less three per cent of its amount, whether or not collected from the user. In addition, fines and penalties, civil and criminal, are provided for defaults and delays; a first and prior lien is imposed upon all of the property of the performer of services, to secure his payment of the tax to the State, whether or not he collects it from the user; and distraint may be had against him as the "taxpayer".

As hereinbefore shown, the appellant bank contended that this statute was invalid against it as to its safe-deposit services unless such services were exempt under the above mentioned exemption provision (as all of its other services

were ruled and conceded to be exempt). But the State court finally concluded otherwise and held that the bank's safe-deposit services are not exempt, and that the statute is valid against the bank "as to the duties, burdens, responsibilities, fines, and penalties imposed upon the bank, in performing the said depository services, to collect and account for, and to pay the said tax."

III.

As to the Federal Questions Being Substantial and Their Presentation.

1. This case was commenced by the State Treasurer against The Colorado National Bank of Denver (and others, but later dismissed as to the others) in the District Court of the City and County of Denver, Colorado. It was brought under the Colorado Declaratory Judgments Act (Colorado Statutes Annotated, 1935, Chapter 93, Sections 78 to 92), which is the so-called "Uniform Declaratory Judgments Law".

The court, as later shown, found that there was an actual (and not a moot) case or controversy admitting of an immediate and definitive determination of the legal rights of the parties, and by its judgment or decree judicially determined those rights, the final adjudication being that the service tax act and the Treasurer's rules, regulations, and interpretations thereof are valid against the bank, and that it is liable to the State for two per cent of its charges on all depository services rendered and to be rendered its customers, whether or not it collects the tax from them, since the effective date of the act (May 15, 1937). Under the Uniform Declaratory Judgments Law, this determination is *res judicata*, and, unless reversed, is binding upon the bank. The adverse proceeding, irrespective of its form, was, therefore, a concrete case and justiciable controversy within the

meaning of those words as used in the United States Constitution and Acts of Congress relating to the jurisdiction of the United States Supreme Court. (See *Ætna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461.)

2. The amended complaint or petition (Folios 1-18) alleged, among other things, the following:

(a) That the bank is a national bank;

(b) That the State Treasurer had properly promulgated rules, regulations, and interpretations, of which provisions numbered 10 and 27 read:

"10. BANKS. Services rendered or performed by banks were included in the Act. It now appears that the law is invalid as applied to National Banks. Following the general principle of law and taxation now established, to the effect that where a tax statute intended to apply state-wide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"27. DEPOSITORIES. Such services rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor" (Folios 7-11).

(c) That the Treasurer had on July 27, 1937, and again on August 27, 1937, demanded of the bank, and it had refused to collect or pay, the said service tax on its safe-deposit services, "or in any manner comply with said law";

(d) That the bank is rendering depository services, taxable under the said law and regulations, which are reasonable, proper, and within the law, and the bank is "responsible and liable for said tax, whether collected from its customers or not, in the manner provided in the said act";

(e) That an actual controversy exists, because of the foregoing, and "the nature of such controversy is that the act in naming banks was, in effect, imposing a tax upon the banks in conflict with the federal laws and hence invalid as to banks" (Folio 14);

(f) That the Treasurer demanded and continues to demand that the bank, "failing and refusing to so collect such tax (meaning the two per cent tax on its safe-deposit services) from its customers, be held responsible and liable therefor in the manner provided, whether collected from its customers or not" (Folio 15).

The petition prayed an adjudication that the bank's safe-deposit services are taxable and that the act is valid as to the bank with respect to the said services, and for other relief.

3. The bank answered (Folios 32-54), alleging among other things:

(a) That it is an agency or instrumentality of the United States;

(b) That it admits the demands, refusals, and controversy above mentioned, arising because the bank is a national bank;

(c) That the bank's safe-deposit business is a part of its banking business; and the answer alleges in detail the facts relating to the incorporation of its vaults in its banking house, taxed with its fixtures as real estate, the bank's operation thereof itself, and not by a subsidiary company,

with the supervision of the Comptroller of the Currency over its operation of that part of its business and his consideration of the pertinent expenses and earnings;

(d) "That under and pursuant to the permission granted by the United States Revised Statutes, Section 5219, as amended (U. S. C. A., Title 12, Section 548), the State of Colorado has by law elected to tax and is taxing the Bank, on its net income, from the period commencing July 1, 1937, and that the said state, and political subdivisions thereof, have taxed and are taxing the Bank's real property to the same extent, according to its value, as other real property is taxed; and that prior to July 1, 1937, the said state, and its political subdivisions, taxed the shares of the said Bank under and pursuant to the first method of taxation granted and permitted by the said Section 5219, as amended";

(e) "That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both";

(f) That the bank is exempt from taxation under the service tax act because of the provision thereof reading, "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt"; and if not exempt, the act is unlawful and unconstitutional, the answer then setting forth the detailed reasons of repugnancy to the Federal Constitution and laws, and especially because: (1) the bank is the "taxpayer", (2) the tax is on its banking business, (3) the bank must procure a license to conduct its business or be guilty of a crime, (4) fines and penalties are imposed upon it, (5) unless the bank makes returns, the State Treasurer may make them and fix the amount of the tax payable by the bank, (6) the act gives the State a first and prior lien on all of the assets of the

bank contrary to Revised Statutes, Section 5242 (U. S. C. A. Title 12, Section 91), and (7) the act makes it criminal for the bank to refuse to pay the tax or to comply with the act from time to time (Folios 43-49);

(g) "That the Bank as a national bank, is a governmental agency or instrumentality of the United States; that the plaintiff in enforcing, or attempting to enforce, the said Service Tax Act as to the Bank, as hereinbefore alleged, is imposing a tax against the Bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his rulings, regulations or interpretations with respect thereto is seeking to deprive the Bank of a right, privilege or immunity secured to it by the Constitution of the United States" (Folios 49-50).

(h) That it is discriminatory and improper for the Treasurer to attempt to apply the act to the bank's deposit-services, when he has admitted and conceded that all of its other banking services are exempt from taxation under the act.

And the bank prayed that the court "determine and declare that under and by virtue of the Constitution and laws of the United States * * * all services performed by the bank, including its depository services, are exempt from tax under the Public Service Revenue Tax Act of 1937 of Colorado."

4. The Treasurer demurred (Folio 58) to the above answer, and the parties stipulated (Folios 57-58) that they would stand upon their above pleadings.

5. Both parties, at all times and even prior to the commencement of the suit, had in mind the inherent Federal

questions, both constitutional and statutory. These questions were suggested in the amended petition and were raised in the answer of the defendant, and were the questions determined in each decision rendered in the case thereafter.

6. The District Court heard the demurrer and decided it against the Treasurer, rendering an opinion, a copy of which is hereto attached as Exhibit B, and by this reference made a part hereof. The District Court's formal ruling upon the bank's contentions, quoted from the first decree and judgment, was as follows:

> "That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults are incident to, and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937, the defendant Bank as the one rendering or performing such services would be the taxpayer, or, if not, would be burdened by such a tax; and that, therefore, the said services are by Section 7 of the said Act expressly exempt from taxation under it as 'services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado'" (Folios 81-82).

7. As to this judgment and decree in favor of the bank, the State Treasurer procured a review by a writ of error in the Supreme Court of the State of Colorado. The cause on error was first heard by six Justices sitting

en banc, the seventh Justice not participating, and resulted on December 27, 1938, in an order of affirmance because the six Justices were equally divided. A copy of the said decision of December 27, 1938, is hereto attached as Exhibit C, and by this reference made a part hereof. Thereafter, and with the January, 1939 term of the said Supreme Court, a new Justice came on the bench, and a petition for a rehearing by the Treasurer was then granted. Additional arguments were then made and additional briefs filed in due time, and on April 17, 1939, the said Supreme Court handed down its decision and opinion, which has now become final, reversing the District Court and remanding the cause for further proceedings in harmony with its said opinion. In the consideration of the cause on rehearing, one of the Justices who had been in favor of the affirmance of the decision for the bank did not participate, and the new alignment of the court consisted of the three Justices who had been in favor of a reversal and the new Justice who went on the bench at the January, 1939, term deciding for a reversal and the two Justices who had before participated and been for an affirmance dissenting, the other Justices who had been for an affirmance not participating. A copy of this opinion, reported under the title of Bedford, Treasurer, *vs.* The Colorado National Bank, 104 Colo. 311, 91 Pac. (2d) 469, is attached hereto as Exhibit D, and by this reference made a part hereof.

For want of a final judgment (See *Hinderlider* v. *La Plata River, etc., Co.*, 291 U. S. 650, 54 S. C. 557, and cases there cited), no appeal was then sought to the United States Supreme Court, and the case was remanded to the District Court, for further proceedings and the entry of a final judgment.

8. Upon the remand, the Treasurer caused the first declaratory judgment and decree to be vacated, the order over-

ruling his demurrer vacated, his demurrer sustained, and presented the second and final declaratory judgment and decree, a copy of which is hereto attached as Exhibit E, and by this reference made a part hereof (Folios 124-133).

Upon the presentation of the said second judgment and decree, the bank objected and upon its entry excepted, its objections and exceptions being in writing and a copy thereof being attached hereto as Exhibit F, and by this reference made a part hereof (Folios 103-114).

9. The bank thereupon by writ of error procured a review in the Supreme Court of the State of Colorado of this last judgment and decree in the cause in the said court entitled The Colorado National Bank of Denver, a national banking association, Plaintiff in Error, *vs.* Homer F. Bedford, as Treasurer of the State of Colorado, Defendant in Error, and numbered 14684 on the docket of the said Supreme Court: The assignments of error filed in the Colorado Supreme Court and upon which the cause was presented are identical with the objections and exceptions set forth in Exhibit F, and reference is hereby made to them.

10. On January 8, 1940, the Supreme Court of the State of Colorado handed down its decision (not yet reported) in the second cause on error, and a copy thereof is hereto attached as Exhibit G, and by this reference made a part hereof. This decision of January 8, 1940, and the judgment rendered in the Colorado Supreme Court thereon is the last and final judgment and is the judgment from which the bank is prosecuting this appeal.

IV.

Citations Believed to Sustain Jurisdiction.

1. The Judicial Code, Sec. 237, as amended, expressly grants an appeal in this case, because the Colorado Supreme Court held, contrary to the contentions of the appellant

national bank, that the Service Tax Act is valid as against it and applicable to it, even though it is a Governmental agency or instrumentality, and expressly exempted by Congress from State taxation except in the exclusive methods permitted by Rev. Stats. Sec. 5219, as amended.

2. The Colorado Supreme Court held that the Act is valid and that the State may tax the appellant national bank, and subject it to all of the burdens, fines, penalties and liens imposed by the Act, unless it "complies" with the Act. The Court said in this respect: "While the Bank is liable to the State for the tax, the Act itself is so worded that the Bank does not carry any of the tax burden *unless it refuses to comply with certain terms of the Act.* To that extent, as applied to the Bank, it is a 'tax payer' within the meaning of Sec. 2 (e), *supra*, and the liability is a 'tax' within the meaning of Sec. 2 (f), *supra*" (104 Colo. page 320, 91 Pac. (2d) 473. Italics are ours).

There is thus presented the question whether a State may properly tax a national bank otherwise than as provided in Rev. Stats. Sec. 5219, as amended, if the Bank declines to perform certain other statutory duties imposed upon it by the same statute. Involved in this question is the further question of the propriety of a State, by statute, forcing a national bank to involuntarily perform certain services, such as acting as a tax collector, for the State.

The tax liability, seemingly stated by the Colorado Supreme Court as being conditional, is in reality absolute. This follows because, by the other "terms of the Act," and judgment and decree rendered and entered, pursuant to the said opinion, which the Colorado Supreme Court affirmed and approved on January 8, 1940, the Bank is liable and responsible for the tax, and subject to all the provisions of the Act, whether or not it collects the tax from the users of its services.

3. Cases in which the United States Supreme Court has reviewed the validity of State statutes, taxing and otherwise burdening national banks and other Federal agencies and instrumentalities, are numerous. *Among them are:*

M'Culloch v. *Maryland,* 4 Wheat. 316;
Davis v. *Bank,* 161 U. S. 275, 16 Sup. Ct. 502;
Owensboro National Bank v. *Owensboro,* 173 U. S. 664, 19 Sup. Ct. 537;
Easton v. *Iowa,* 188 U. S. 220, 23 Sup. Ct. 288;
Clement National Bank v. *Vermont,* 231 U. S. 120, 34 Sup. Ct. 31;
Federal Land Bank v. *Crosland,* 261 U. S. 374, 43 Sup. Ct. 385;
Pittman, Clerk v. *Home Owners Loan Corporation* (decided Nov. 6, 1939), 60 Sup. Ct. 15.

4. The judgment in this case was entered by the Colorado Supreme Court on January 8, 1940; and petition for appeal is presented to the Chief Justice of the Supreme Court of Colorado, this 17th day of January, 1940.

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellant.

EXHIBIT "A".

Colorado Public Revenue Service Tax Act of 1937.

(S. L. of Colo., 1939, Ch. 158.)

The act re-enacts Chapter 240 Session Laws of Colorado, 1937.

Section 1. It is to be known as "The Public Revenue Service Tax Act of 1937."

"Section 2. *Definitions.* (a) The term 'person' includes any • • • association, corporation," etc.

"(c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter designated and defined, when said act or service is rendered, furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.

(d) The term 'business' shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the State under the terms of this Act.

(f) The term 'tax' means either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax, or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

(g) The term 'value of services' means the price to the user, exclusive of any direct tax imposed by the federal government or by this Act.

(h) The term 'gross taxable services' shall mean the total amount received in money, credits, property or other consideration valued in money from services rendered or performed within this State as herein defined, and embraced within the provisions of this Act; *provided*, that the taxpayer may take credit in his report of gross taxable services

for an amount equal to the value of services rendered or performed when the full value of services thereof is refunded either in cash or by credit and; *provided further,* that on all services rendered or performed, valued in money, when such services are made under conditional contract, or under other contract or agreement where the payment of the principal sum thereunder be extended over a period longer than sixty (60) days from the date of contract or agreement thereof, only such portion of the value of services thereof may be accounted for the purpose of imposition of the tax imposed by this Act as has actually been received in cash by the taxpayer during the period for which the tax imposed by this Act is due and payable; and *provided further,* that taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amounts so collected."

Definitions made in other paragraphs of this section are not pertinent to this cause.

Section 3 exempts from taxation services the cost of which enter into sales of tangible personal property subject to the retail sales tax.

"Section 4. (a) It shall be unlawful for any person to engage in the business of rendering or performing services as the same is defined in this act, after the effective date of this act without first having obtained a license therefor, which license shall be granted and issued by the state treasurer and shall be in force and effect until the thirty-first day of December of the year in which it is issued, unless sooner revoked; except a person who has obtained and who holds a license issued under the provisions of any statute requiring the issuance or securing of a license and a person engaged in the business of rendering or performing services of a professional, technical or scientific nature.

(b) Such license shall be granted or renewed only upon application stating the name and address of the person desiring such a license, the name of such business and the location, including the street number of such business, and such other facts as the state treasurer may require. It shall

be the duty of each such licensee on or before January first of each year, to obtain a renewal thereof if the licensee remain in business or liable to account for the tax herein provided, but nothing herein contained shall be construed to empower the state treasurer to refuse such renewal, except revocation for cause of licensee's prior license. For each license issued hereunder a fee of one dollar ($1.00) shall be paid, which fee shall accompany the application together with an additional fifty cents (50¢) for filing fee. A further fee of one dollar ($1.00) shall be paid for each year or fraction thereof for which said license is renewed, together with an additional fee of fifty cents (50¢) for filing fee; provided that only one-half of said one dollar ($1.00) fee shall be charged on licenses issued after July first of any year."

"(e) The state treasurer may, on a reasonable notice and after full hearing, revoke the license of any person found by the treasurer to have violated any provision of this act. This power to revoke licenses shall extend only to licenses issued by the state treasurer. Any person engaged in the business of rendering or performing services as the same is defined in this act, without having secured a license therefor as herein provided, shall be guilty of a misdemeanor, and shall be punished accordingly."

"(g) No license shall be required for any person engaged exclusively in the business of rendering or performing services which are exempt from taxation under this act.

Section 5. From and after the effective date of this act there is hereby levied and imposed upon the services specified in this act and measured by the amount paid therefor and there shall be collected and paid:

. . . . . .

(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: . . . banks, finance companies; trust companies and depositories; except as to interest on money loaned, stock or commission brokers or agents; and any other business of a similar nature in which services (not professional) are performed on a price or fee basis."

(This section also lists other taxable services not pertinent to the bank's business.)

"Section 6. (a) Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon his total taxable services rendered or performed, and shall, before the fifteenth day of each month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, less three (3) per cent thereof to cover the expense of the person rendering or performing services in the collection and remittance of said tax. Such return, verified by oath or affirmation of the taxpayer or his duly authorized agent, shall contain such information and be made in such manner and upon such forms as the state treasurer may prescribe and the state treasurer may extend the time for making returns and paying the taxes due under such reasonable rules and regulations as he may prescribe, but no such extension shall be for a greater period than is provided for in subdivision (e) of this section. The burden of proving that any person is exempt from collecting the tax on any services rendered or performed and paying same to the state treasurer, or from making such returns, shall be on the person rendering or performing such services under such reasonable requirements of proof as the state treasurer may prescribe.

(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

(c) To provide uniform methods of adding the tax, or the average equivalent thereof, to the value of service, it shall be the duty of the state treasurer to formulate and promulgate after hearing appropriate rules and regulations to effectuate the purpose of this section.

(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the public or to any user directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by him or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(e) If the accounting methods regularly employed by the person rendering or performing service in the transaction of his business, or other conditions, are such that reports of services rendered or performed made on a calendar month basis will impose unnecessary hardship, the state treasurer may, upon written request of the person rendering or performing services, accept reports at such intervals as will in his opinion better suit the convenience of the taxpayer and will not jeopardize the collection of the tax. Provided, however, the state treasurer may by rule permit taxpayers whose monthly tax collected is less than twenty dollars ($20.00) to make returns and pay taxes at intervals not greater than every three (3) months.

(f) For the purpose of more efficiently securing the payment, collection and accounting of the taxes provided for under this act, the state treasurer in his discretion, by proper rules and regulations, may provide for the issuance of tokens or other appropriate devices to facilitate collections.

(g) A person doing business in two or more places or locations, taxable hereunder, may file one return covering all such business activities engaged within this state.

(h) If any person shall, during any reporting period, collect as a tax an amount in excess of two (2) per cent of his total services rendered or performed, he shall remit to the state treasurer the full net amount of the tax herein imposed and also such excess; and if any person under the pretense of representation of collecting the tax imposed by this act shall collect during any reporting period an amount in excess of two (2) per cent of his total services rendered or performed the retention of such excess or any part thereof, or the intentional failure to remit punctually to the state treasurer the full amount required to be remitted by

the provisions of this chapter, is declared to be unlawful and shall constitute a misdemeanor.

Section 7. (a) All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States Government, to the State of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to or by religious, charitable, educational and eleemosynary institutions, in the conduct of their regular religious, charitable, educational or eleemosynary functions and all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this act; provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to whether or not any services rendered or performed are exempt from taxation hereunder, nevertheless the person rendering or performing services shall collect and the user shall pay such tax, and the person rendering or performing services shall thereupon issue to the user a receipt or certificate, on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; provided further, that a refund shall be made, or a credit allowed, for the tax so paid under dispute by any user who has an exemption as in this act provided."

(Then follow provisions for refunds to users and the procedure to procure them.)

Section 8 relates to the State Treasurer's keeping and not divulging the contents of the returns made under the act.

"Section 9. (a) As soon as practicable after the return is filed, the State Treasurer shall examine it; if it then ap-

pears that the correct amount of tax to be remitted is greater or less than that shown in the return to be due, the tax shall be recomputed. If the amount paid exceeds that which is due, the excess shall be refunded or credited against any subsequent remittance from the same persons. If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one-half of one per cent per month from the time the return was due, shall be paid by the person rendering or performing services within ten (10) days after written notice and demand to him is received from the State Treasurer.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten per cent (10%) of the total amount of the deficiency and interest in such case shall be collected at the rate of one (1) per cent per month on the amount of such deficiency from the time the return was due, from the person required to file the return, which interest and addition shall become due and payable ten (10) days after written notice and demand to him by the Treasurer. If any part of the deficiency is due to fraud with the intent to evade the tax, then there shall be added fifty per cent (50%) of the total amount of the deficiency and in such case, the whole amount of the tax unpaid, including the additions, shall become due and payable ten (10) days after written notice and demand by the State Treasurer and an additional one per cent (1%) per month on said amount shall be added from the date the return was due until paid.

(c) For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person, the State Treasurer or his duly authorized deputies, may hold investigations and hearings concerning any matters covered by this act and may examine any relevant books, papers, records or memoranda of any such person and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of such services rendered, and may take testimony and require proof for its information.

The Treasurer and his authorized deputies shall have power to administer oath to such persons."

(The balance of this section relates to the procedure of the State Treasurer in issuing subpoenae, procuring the assistance of the Court to compel the attendance of witnesses, etc.)

"Section 10. It shall be the duty of every person engaging or continuing in business as designated and defined in this act in this state, to keep and preserve suitable records for a period of three years of all services rendered by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is liable under the provisions of this act.

Section 11. (a) The tax imposed by this act shall be a first and prior lien upon the stock of goods and business fixtures of any person rendering or performing services or other person liable for the payment of taxes under this act and shall take precedence over other liens or claims of whatsoever kind or nature, except as to preexisting liens on property not used in performing services as provided herein; * * *.

(b) Whenever the business or property of any taxpayer subject to this act shall be placed in receivership, bankruptcy or assignment for the benefit of creditors, or seized under distraint for property taxes, all taxes, penalties and interest imposed by this act shall be a prior and preferred claim against all the property of said taxpayer, except as to pre-existing liens on property not used in performing services as provided herein, and no sheriff, receiver, assignee, or other officer shall sell such property of any person subject to this act under process or order of any court, without first ascertaining from the State Treasurer the amount of any taxes due and payable under this act, and if there be any such taxes due, owing or unpaid, it shall be the duty of such officer to first pay the amount of said taxes out of the proceeds of said sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind or nature, except the costs of the proceedings.

Section 12. (a) All sums of money paid by the user to the person rendering or performing services as taxes imposed by this chapter shall be and remain public money the property of the State of Colorado, in the hands of such person rendering or performing services and he shall hold the same in trust for the sole use and benefit of the State of Colorado until paid to the State Treasurer, as herein provided, and for failure to so pay to the State Treasurer, such person rendering or performing services shall be punished as provided by law.

(b). If a person neglects or refuses to make a return in payment of the tax as required by this act, the State Treasurer shall make an estimate, based upon such information as may be available, of the amount of taxes due for the period or periods for which the taxpayer is delinquent; and upon the basis of such estimated amount, compute and assess in addition thereto, a penalty equal to ten per cent (10%) thereof, together with interest on such delinquent taxes at the rate of one per cent (1%) per month from the date when due. Promptly thereafter, the State Treasurer shall give to the delinquent taxpayer written notice of such estimated taxes, penalty and interest, which notice must be served personally or by registered mail. Such estimate shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the State Treasurer ten (10) days from the date of service of the notice or the date of mailing by registered mail; . . .

(c) If any taxes, penalty or interest imposed by this act and shown due by returns filed by the taxpayer or as shown by assessments duly made as provided herein, are not paid within five (5) days after the same are due, the State Treasurer may issue a notice, setting forth the name of the taxpayer, the amount of the tax, penalties and interest, the date of the accrual thereof, and that the State of Colorado claims a first and prior lien therefor on the real and tangible personal property of the taxpayer except as to pre-existing liens on property not used in performing services as provided herein. Said notice shall be on forms prepared by the State Treasurer, and shall be verified by him or his

duly qualified deputy, or any duly qualified agent of the State Treasurer, whose duties are the collection of such tax, and may be filed in the office of the clerk and recorder of any county in the state in which the taxpayer owns real or tangible personal property, and the filing of such notice shall create such lien on such property in that county and constitute notice thereof. After said notice has been filed, or concurrently therewith, or at any time when taxes due are unpaid, whether such notice be filed or not, State Treasurer may issue a warrant under the official seal of the Treasurer of the State of Colorado directed to any duly authorized revenue collector, or to the sheriff of any county of the state, commanding him to levy upon, seize and sell sufficient of the real and personal property of the tax debtor found within his county for the payment of the amount due, together with interest, penalties and costs, as now or hereafter may be provided by law.

(d) Such revenue collector or the sheriff shall forthwith levy upon sufficient of the property of the taxpayer and said property so levied upon shall be sold in all respects with like effect and in the same manner as is prescribed by law in respect to executions against property upon judgment of a court of record, and the remedies of garnishments shall apply. The sheriff shall be entitled to such fees in executing such warrant, as are now allowed by law for similar services."

(e) This paragraph provides for the release of the lien when the delinquent taxes are paid.

(f) This paragraph provides that it is the duty of county clerks to record the above notices.

"(g) The State Treasurer may also treat any such taxes, penalties or interest due and unpaid as a debt due the state from the vendor. In case of failure to pay the tax, any portion thereof, or any penalty or interest thereon when due, the State Treasurer may recover at law the amount of such taxes, penalties and interest in such justice, county or district court of the county wherein the taxpayer resides or has his principal place of business having jurisdiction of the

amounts sought to be collected. The return of the Taxpayer or the assessment made by the State Treasurer, as herein provided, shall be 'prima facie' proof of the amount due. Such actions may be actions in attachment, and writs of attachment may be issued to the constable or sheriff as the case may be and in any such proceeding no bond shall be required of the State Treasurer, nor shall any constable or sheriff require of the State Treasurer an indemnifying bond for executing the writ of attachment, or writ of execution upon any judgment entered in such proceedings; and the State Treasurer may prosecute appeals or writs of error in such cases without the necessity of providing bond therefor. It shall be the duty of the Attorney General or any district attorney when requested by the State Treasurer, to commence action for the recovery of taxes due under this act, and this remedy shall be in addition to all other existing remedies or remedies provided in this act, and the provisions of this section and Section 11 shall apply to taxes now due, as well as those becoming due hereafter. The State Treasurer may, for good cause shown, waive any penalty *impared* by this act. A penalty shall be deemed any charge in excess of six (6) percent interest per annum.

Section 13 provides for hearings before the State Treasurer of persons feeling aggrieved.

"Section 14. (a) Every decision of the State Treasurer shall be in writing and notice thereof shall be mailed to the person rendering or performing services within ten (10) days, and all such decisions shall became final upon the expiration of thirty (30) days after notice of such decision shall have been mailed to the person rendering or performing services, unless proceedings are taken within said time for review thereof as hereinafter provided."

Subsequent paragraphs of this section provide for reviews in the District Court of decisions of the State Treasurer.

Section 15 relates to the notices to be given by the State Treasurer.

"Section 16. The license and tax imposed by this act shall be in addition to all other licenses and taxes imposed by law, except as herein otherwise provided."

Section 17. It shall be unlawful for any person rendering or performing services to refuse to make any return provided to be made in this act or to make any false or fraudulent return or false statement on any return or fail and refuse to make payment to the State Treasurer of any taxes collected or due the state, or in any manner evade the collection and payment of the tax, or any part thereof, imposed by this act, or for any person to fail or refuse to pay such tax, or evade the payment thereof, or to aid or abet another in any attempt to evade the payment of the tax imposed by this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. Any corporation making a false return or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor. Any court of competent jurisdiction, including the justice court, of the county in which the offender resides, or, if a corporation, then the county of its principal place of business, shall have jurisdiction to enforce this section.

In addition to the penalties, provided by this act, any person who shall knowingly and willfully swear to or verify any false statement shall be guilty of the offense of perjury and on conviction thereof shall be punished in the manner provided by law.

Section 18. Any person guilty of a misdemeanor, as defined and declared in this act, upon conviction, shall be punished by a fine of not exceeding One Thousand ($1,000.00), or by imprisonment not exceeding six (6) months in the county jail, or both such fine and imprisonment.

Section 19. The administration of this act is vested in and shall be exercised by the State Treasurer who shall administer this act by means of or through the department or agency now or hereafter designated or established for the purposes of collecting the excise taxes provided by and enforcing the provisions of the 'emergency retail sales tax

act of 1935'. The State Treasurer shall prescribe forms and reasonable rules and regulations in conformity with this act for the making of rules and for the ascertainment, assessment, and collection of the taxes imposed hereunder and for the proper administration and enforcement of this act. General and special rules may be adopted, amended, or rescinded by the State Treasurer only after public hearing or trial to be heard thereon, of which proper notice has been given. General rules shall become effective ten (10) days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten (10) days after notification to or mailing to the last known address of the individual or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the State Treasurer and shall become effective in the manner and at the time prescribed by the State Treasurer. The State Treasurer shall cause to be printed for distribution to the public the general rules and regulations as herein provided."

Section 20 relates to the use to be made by the State Treasurer of the funds collected under the tax.

Section 21 continues in force penalties, liabilities, etc. incurred under former statutes relating to an excise tax on services.

"Section 22. If any section, subsection, sentence, clause or phrase of this act is, for any reason, held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The General Assembly hereby declares that it would have passed this act, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional."

The balance of the sections relate to the effective date of the act.

EXHIBIT "B".

Memorandum Opinion of the District Court, Given Upon Entering the First Judgment or Decree, Which Was Later Reversed.

Homer F. Bedford as Treasurer of Colorado seeks a judgment declaring that the services rendered by Colorado National Bank in maintaining safety deposit boxes and vaults for use for hire by the public are taxable under Colorado Service Tax law of 1937. The Bank claims such services are exempt from taxation. The matter is before the Court on the plaintiff's demurrer to defendant's answer.

The Colorado Service Tax law imposes a tax on services rendered, makes the person performing the services personally liable to the state for all taxes paid by those receiving the services and also personally liable to the state for all taxes due for services rendered, whether they are collected or not. The Act defines the term "taxpayer" as the person obligated to account to the state for taxes collected or to be collected or due the state. Persons performing taxable services are required by the Act to procure a license from the state and to make monthly reports to the state treasurer. The tax imposed by the Act is made a lien upon the goods and property of the person performing the services.

In the detailed list of businesses in connection with which services are taxed under the Act appears the following: "banks, finance companies, trust companies and depositories," and plaintiff contends that this language authorizes the state in demanding that plaintiff account to the state for depository services rendered, in accordance with the Act. Section 7 of the act provides, inter alia, that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this Act," and the Bank's claim of exemption is based upon this provision. The Bank claims that the service tax law makes the performer of the services the taxpayer, and that such form of taxation is prohibited by Act of Congress (U. S. Code Annotated, Title 12, Sec. 548), reading in part as follows:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

It is admitted that the State of Colorado taxes national banks on their income. The state admits that if the service tax law imposes the tax on the bank, that the exemption applies, but asserts that under our statutes the person performing the services is merely an agent of the state for collecting the tax, and consequently the real taxpayer is the recipient or the purchaser of the services. Cases are cited by both sides from other states interpreting tax laws similar to the one here being scrutinized. In the recent case of Rinn *v.* Bedford, not yet reported, our Supreme Court held the service tax law constitutional and denominated the tax imposed an excise tax. While the question of who is the taxpayer was not directly involved in that case, the opinion refers to the "tax imposed upon attorneys at law." The Court was referring to taxes upon services rendered by attorneys and not to services rendered to attorneys by others. The California sales tax law imposes the tax on retailers as a tax on the privilege of doing business, and has been upheld as a valid excise tax. The Kentucky sales tax law by its terms makes the retailer the taxpayer, but the courts of that state interpreted it as a tax on the consumer or buyer. (City of Covington *v.* Tax Commission, 77 S. W. (2d) 386.) The Court in that case cited Pierce Oil Co. *v.* Hopkins, 282 Fed. 253, a case from Arkansas, which held that a gasoline tax law requiring dealers to collect one cent a gallon for each gallon of gasoline sold, imposed a tax on the seller, and the

Kentucky Court distinguishes the Pierce case because the Arkansas Statute imposed upon the seller a personal obligation to pay the levied tax whether he collected it from the purchaser or not. The Court in the Pierce Oil Co. case said:

"It is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. * * * The seller is required to register and to file a report of his sales and show therein 'the amount of tax due by said seller.' The seller must pay the tax unless he collects the amount from the purchaser. * * * The penalties provided in the act are all levelled against the seller."

The Colorado Act makes the seller of the services personally liable to the state and prescribes severe penalties to be enforced against the seller.

In Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, the Court held the United States not liable to pay a gasoline tax. The Mississippi law required persons engaged in selling gasoline to pay one cent per gallon of gasoline sold for the privilege of engaging in the business. The retailer was the taxpayer. The Court said:

"The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital."

The answer of defendant alleges facts, admitted by the demurrer, from which the conclusion must follow that the defendant is a governmental agency or instrumentality, and that the services performed by it in operating depositories are an incident to and integral part of its banking business. Considering the provisions of the Service Tax Act, it seems certain that as to services rendered by the Bank for which it does not collect the tax, the Bank is the taxpayer. The state looks only to the Bank to receive the amount of the tax, whether collected or not. The Act is so drawn that it makes no distinction, so far as liability of those performing services is concerned, between taxes collected by the Bank from its customers and taxes due the state that are not collected.

Even though, strictly speaking, the Bank may be only the agent of the state and a trustee as to money in its hands collected as taxes from the purchasers of the services, still the Act imposes upon it burdens with reference to taxes which it must discharge for the privilege of doing business and performing the services.

The burdens imposed upon the Bank by the Act, in my judgment, constitute an interference with the proper functions of a governmental agency and impair the efficiency of the Bank to discharge the duties for the performance of which it was created.

The demurrer to the answer is overruled.

It is the judgment and declaration of the Court that the services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the service tax law of Colorado.

Plaintiff's exceptions are noted. Stay of execution for thirty (30) days is allowed, and plaintiff may have time and until sixty (60) days within which to prepare, tender and have settled a bill of exceptions.

Motion for new trial is dispensed with.

Done and signed in open court this 9th day of June, A. D. 1938.

By the Court:

ROBERT W. STEELE,
Judge.

EXHIBIT "C".

Colorado Supreme Court Decision of Affirmance of December 27, 1938.

Mr. Justice Holland does not participate in the consideration of this cause. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Knous think the judgment should be affirmed, while Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke think it should be reversed. The court being "equally divided in opinion, the judgment

of the court below shall stand affirmed." Code of Civil Procedure Sec. 439.

EXHIBIT "D".

Opinion Rendered by the Supreme Court of the State of Colorado on April 17, 1939 (104 Colo. 311, 91 Pac. (2d) 469).

Mr. Justice Bock delivered the opinion of the court.

This action was brought by plaintiff in error under the Uniform Declaratory Judgments Act, '35 C. S. A., chapter 93, sections 78-92, to obtain a judicial declaration that the state has the power to compel national banks to collect and remit service taxes upon depository services performed by such banks to the public, in compliance with the Public Revenue Service Tax Act of 1937 (S. L. '37, c. 240).

Upon the filing of an amended petition defendant in error answered, to which answer plaintiff in error demurred. The demurrer was overruled. It was previously agreed that the party against whom the ruling on demurrer was made would stand upon such ruling. Plaintiff in error made that election and the court decreed, "That all services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation" under the Public Revenue Service Tax Act, *supra*. Reversal of that decree is sought here, and the assignment of errors, in substance, raise two questions, namely: (1) Upon whom is the service tax imposed, the party rendering the service or the one who uses it? (2) Does the requirement to collect and remit the tax upon depository service constitute a burden upon, or an interference with, the proper functions of a national bank as a governmental agency?

Reference will hereinafter be made to plaintiff in error as treasurer and to defendant in error as the bank.

(1) It may be conceded that if the bank is the party upon which the tax is solely imposed, then the act as to national banks would be contrary to the federal statutes (U. S. Revised Statutes, section 5219, U. S. C. A. Title 12, section 548), and invalid. The pertinent provisions are:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

This section was intended to protect capital invested in national banks from unfriendly discrimination by the states in the exercise of the taxing power. *Adams* v. *Nashville* (Tenn. 1877), 95 U. S. 19, 30, 24 L. Ed. 369; *Mercantile National Bank* v. *City of New York* (C. C. N. Y. 1886), 28 F. 776 (affirmed 1887), 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *Roberts* v. *American National Bank of Pensacola* (1929), 97 Fla. 411, 121 So. 554; *Des Moines National Bank* v. *Fairweather* (Iowa, 1923), 263 U. S. 103, 106, 44 Sup. Ct. 23, 68 L. Ed. 191; *Minnehaha National Bank* v. *Anderson* (Dist. Ct., S. D. 1924), 2 F. (2d) 897.

(2) It heretofore has been determined that a state can only tax a national bank with the consent of Congress and not otherwise. *First National Bank v. Anderson*, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. Ed. 295, and numerous other authorities. Section 5219, *supra*, furnishes the exclusive authority governing state taxation as to national banks. *Bank of California v. Richardson*, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372.

Whether this principle of implied constitutional immunity from the taxation of national banks has been modified, when a nondiscriminatory tax is levied on the safety deposit box service performed by such banks, by recent opinions of the Supreme Court of the United States in *Graves* v. *People ex rel.*, 59 Sup. Ct. 595, 83 L. Ed. 577, and in *State Tax Commission* v. *Van Cott*, 59 Sup. Ct. 605, 83 L. Ed. 588, is not

necessary for us to determine. According to the views therein expressed, the trend is definitely to narrow implied constitutional intergovernmental immunity.

(3) Before discussing the assignment of errors, we direct our attention to section 4 (a) of our service tax act, which provides, in effect, that a bank must procure a license to conduct a safety deposit box business, and conducting such a business without procuring the necessary license constitutes a misdemeanor. Excepted from this provision are persons who hold licenses under any other statute and those performing services of a professional, technical or scientific nature. It is conceded that the bank is authorized under its federal charter to do a safety deposit box business. The state, therefore, cannot require it to take out this license or collect the fee therefor from the bank. *Bank of California* v. *Portland*, 157 Ore. 203, 69 P. (2d) 273, 275; *Austin* v. *Seattle*, 176 Wash. 654, 30 P. (2d) 646; *City of Shelbyville* v. *Citizens Bank of Shelbyville*, 114 S. W. (2d) 719. Section 4 (a) *supra*, does not contemplate the licensing or collection of the fee therefor from all persons performing and collecting taxable services under the act. In so far as this section is concerned, if applied to national banks, it would, under the above authorities, be invalid. No attempt is made in the instant case to enforce it. In fact, the treasurer says that no license fees are demanded from the bank. The validity of this section of the act, however, does not affect other portions thereof as applied to the bank. Section 22 declares it as the legislative intent that it would have passed the act irrespective of the fact that any one or more sections be declared invalid. It may be assumed, therefore, that the bank is not required to comply with Section 4-(a) of the act.

(4) Our first concern under the assignment of errors is whether the service tax involved here is imposed upon the bank and whether it bears this tax burden. We think not.

In our determination of this question it is necessary that we quote certain pertinent portions of the act, as follows:

"Section 2. (c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter desig-

nated and defined, when said act or service is rendered, *furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.*

* * * * * * *

"(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act.

"(f) The term 'tax' means *either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax,* or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

"(h) * * * taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amount so collected.

"Section 5. From and after the effective date of this act there is hereby *levied and imposed upon the services specified in this act and measured by the amount paid* therefor and there shall be collected and paid:

(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: * * * banks, finance companies, trust companies and depositories, * * *.

"Section 6. Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon his total taxable services rendered or performed, and shall before the fifteenth day of each month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, *less three (3) per cent thereof to cover the expense of the person rendering or*

performing services in the collection and remittance of said tax. * * *

"(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

* * * * * * * *

"(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the public or to any user, directly or indirectly, *that the tax or any part thereof imposed by this act will be assumed or absorbed by him* or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"Section 7. All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States government, to the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to religious, charitable and eleemosynary corporations, in the conduct of the regular religious, charitable or eleemosynary functions and activities and all services rendered or performed to or by educational institutions, directly under the supervision and control of a religious sect or denomination in the conduct of the regular educational functions and activities, and all *services rendered or performed which the state of Colorado is prohibited from taxing under the Constitution or laws of the United States*, or the state of Colorado, *shall be exempt from taxation under this act;* provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to

whether or not any services rendered or performed i exempt from taxation hereunder, nevertheless the perso rendering or performing services shall collect and the use shall pay such tax, and the person rendering or perform ing services shall thereupon issue to the user a receipt o certificate on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; provided further that a refund shall be made, or a credit allowed, for the tax so paid under dispute by any user who has an exemption as in this act provided. Such refund shall be made by the state treasurer after compliance with the follow ng conditions precedent:

"Applications for refund must be made within sixty (60) days after the rendering or performance of services whereon an exemption is claimed and must be supported by the affidavit of the user accompanied by the original paid invoice, receipt and certificate issued by the person rendering or performing services, and be made upon such forms as shall be prescribed and furnished by the state treasurer, which forms shall contain such information as said state treasurer shall prescribe. Upon receipt of such application the treasurer shall examine same with all due speed and shall give notice to the applicant by order in writing of his decision thereon. Aggrieved applicants may, within ten (10) days after such decision is mailed to them, petition the treasurer for a hearing on the claim in the manner provided in this act. The right of any person to a refund under this article shall not be assignable and such application for refund must be made by the same person who paid the tax thereon as shown in the invoice, receipt or certificate.

"Section 12. All sums of money paid by the user to the person rendering or performing services as taxes imposed by this act shall be and remain public money, the property of the state of Colorado, in the hands of such person ren-

dering or performing services and he *shall hold the same in trust for the sole use and benefit of the state of Colorado until* paid to the state treasurer as herein provided, and for failure to so pay to the state treasurer, such person rendering or performing services may be punished, as provided by law." (all italics ours).

The legislative intent seems to be clear, i. e., to impose a tax upon the user of the service. The Levy is "imposed upon the services specified in this act." In holding that this is a tax upon the user, we are fortified by a number of authorities construing similar acts. In fact, the great weight of authority is definitely in that direction. *Breaux Ballard* v. *Shannon*, 271 Ky. 553, 112 S.W. (2d) 996; *Covington* v. *Tax Commission*, 257 Ky. 84, 77 S.W. (2d) 386; *Wiseman* v. *Phillips*, 191 Ark. 63, 84 S.W. (2d) 91; *Morrow* v. *Henneford*, 182 Wash. 625, 47 P. (2d) 1016; *School District* v. *Smith* (Mo.), 111 S.W. (2d) 167; *Long* v. *Roberts & Son*, 234 Ala. 570, 176 So. 213.

In construing a similar act (Sales Tax Act, chapter 144, '35 C. S. A.), we have recently held that the sales tax involved is not imposed upon the dealer; that he is merely the state's agent to collect and he is compensated for that service. *Bedford* v. *Hartman Brothers, Inc.*, 104 Colo. 190, 89 P. (2d) 584.

In the instant case the direct tax burden is not upon the bank. It is the state's agent to collect and it is compensated for that service. The tax when collected by the bank is the property of the state, which it holds in trust for the sole use and benefit of the state until paid to the treasurer as provided by law. While the bank is liable to the state for the tax, the act itself is so worded that the bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank, it is a "taxpayer" within the meaning of section 2 (e), *supra*, and the liability is a "tax" within the meaning of section 2 (f), *supra*.

(5, 6) The second question under the assignment of errors requires us to answer whether the duties imposed upon national banks by the terms of the act, requiring them to

collect and remit the tax upon their safety deposit box service, constitutes a burden upon or an interference with the proper functions of a national bank as a governmental agency. This also involves the exemption in section 7, *supra*, upon which the bank relies, That a national bank is a governmental agency and therefore an instrumentality through which the government performs certain fiscal functions cannot be questioned. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The national bank system was devised, primarily, to provide a national currency, secured by a pledge of United States bonds, and they are agencies or instruments of the government for that purpose. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700. Their powers are defined and limited by the acts of Congress. *Federal Intermediate Credit Bank* v. *L'Herisson*, 33 F. (2d) 841.

(7, 8) There is no congressional requirement that a national bank conduct a safety deposit box service. The relationship created under such service is that of bailor and bailee and not that of debtor and creditor. *Tuckerman* v. *Mearns*, 262 Fed. 607. A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business.

(9) Under Title 12, U. S. C. A., section 24, it is provided, "That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any state to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus." This would indicate that a national bank may conduct a safety doposit box business under a separate state organization, with limitations.

Section 5228, United States Revised Statutes, Title 12, U. S. C. A., Section 133, prohibits national banks from continuing business after notice by the comptroller of default, "except to receive and safely keep money belonging to it, and to deliver special deposits." *National Bank* v. *Graham*, 100 U. S. 699, 25 L. Ed. 750. From this it may be inferred

that safety deposit box service is clearly separable from the banking business as a governmental instrumentality under the federal law.

Counsel for plaintiff in error place great reliance upon the case of *Bank of California* v. *Portland, supra.* That case involved only authority of the city to require a license and payment of a fee therefor by banks conducting a business of "Safe-deposit vault." Much said in that case concerning the power of national banks to conduct safety deposit vaults is merely *obiter dicta.* We already have indicated that we are not here concerned with the imposition of license fees on banks which conduct a safety deposit box business. We are in agreement with the conclusions announced in the *Portland* case.

(10) That the tax involved in the instant case is non-discriminatory cannot be questioned. It applies to all banks, state and national, and to any person conducting a safety deposit box business, independent of banking operations. We do not disagree with cases which hold that the receiving of special deposits is a power incidental to the business of banking. What we do say is, that it is not a necessary power to the conduct of a banking business, the absence of which would prevent the bank from discharging its duties to the government. In other words, there is nothing in the service tax act that would burden the bank, as a governmental instrumentality, in conducting its banking business. *In re Leavy,* 85 F. (2d) 25. How, we may ask, do the requirements of the service tax act interfere with any powers of the bank or burden its governmental activities? Every law, state or national, controlling banks, implies a restraint, but is the restraint involved here such a burden upon national banks as would impair their operations as governmental agencies?

In McClellan v. *Chipman,* 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461, Mr. Justice White, commenting upon the relationship between state and federal laws, as applied to national banks, quotes from *National Bank* v. *Commonwealth,* 9 Wall. 353, 362, as follows: "National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state

than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.'"

There is nothing in the service tax act which incapacitates the bank from discharging its duties to the government. That, after all, is the test: whether there is any unconstitutional interference with the operations of, or burden imposed upon, the bank by the applicable provisions of the act.

Mr. Chief Justice Hughes, in the recent case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, 58 Sup. Ct. 208, discusses the validity of a state income tax imposed by the state of West Virginia upon the gross receipts of the Dravo Company under contracts with the United States, as follows:

"Second. Is the tax invalid upon the ground that it lays a direct burden upon the federal government? The Solicitor General, speaking for the government, supports the contention of the state that the tax is valid. Respondent urges the contrary.

"The tax is not laid upon the government, its property or officers. *Dobbins* v. *Commissioners*, 16 Pet. 435, 449, 450.

"The tax is not laid upon an instrumentality of the government (citing cases). Respondent is an independent contractor. The tax is nondiscriminatory.

"The tax is not laid upon the contract of the government (citing cases). The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Mere operation of safety deposit vaults by a national bank does not, in itself, involve a governmental relation with the federal government. In fact, recent federal authorities give basis for the belief that even if the service tax were

imposed upon the bank, under the circumstances in the instant case, it would not be an interference with any instrumentality of the government and would be valid. It is not necessary for us to, and we do not, pass upon that question.

Counsel for the bank argue that the creation of a first and prior lien upon it (see section 11, Service Act) in the event of its failure to collect and pay, imposes a direct burden upon it as a federal instrumentality. Whether or not this contention is well founded is not an issue in the instant case. We leave that question open. The act is enforceable without the creation of this lien as applied to a national bank.

(11) We conclude, that the tax created by the service tax act is imposed, not upon the bank, but upon the user of the service, and that the requirement that the bank collect and pay the same to the treasurer, under the circumstances detailed in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the bank as a governmental instrumentality. The constitutional immunity claimed by the bank does not apply.

In view of our conclusion, we do not discuss other questions raised.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the answer of the bank, and for further proceedings according to law.

Mr. Justice Burke and Mr. Justice Knous dissent.

Mr. Justice Francis E. Bouck not participating.

EXHIBIT "E".

Second Declaratory Judgment and Decree.

This cause coming on to be heard, upon its merits, upon plaintiff's amended petition for declaratory judgment and his amendment to paragraph VII thereof, upon the defendant's answer thereto, upon plaintiff's demurrer to the said answer, upon the sustaining of the said demurrer, upon the stipulation of the parties to stand on the ruling on the demurrer to defendant's answer, dated and filed herein on

May 9, 1938, and also upon the remittitur from the Supreme Court of the State of Colorado, in the cause therein entitled "Homer F. Bedford, as Treasurer, of the State of Colorado, Plaintiff in Error v. The Colorado National Bank, a Banking Corporation, Defendant in Error," and numbered 14405, and the opinion rendered in the said cause on April 17, 1939, reversing the order overruling the demurrer to the answer and reversing the judgment entered accordingly; and plaintiff appearing by his attorneys, Byron G. Rogers, Attorney General, and Elmer P. Cogburn, Assistant Attorney General, and the defendant appearing by its attorneys, Walter W. Blood, and Bartels, Blood and Bancroft; and the Court having fully considered all of the foregoing and being now sufficiently advised in the premises;

The Court Doth Find and Conclude as a Matter of Law:

That the defendant is a national banking association organized and existing under and by virtue of the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults do not involve any governmental relation with the United States; that the service tax imposed by the Colorado Public Revenue Service Tax Act of 1937 (S. L. of Colo. 1937, Ch. 240, as readopted, extended and amended by House Bill No. 352, adopted by the General Assembly of the State of Colorado and approved May 1, 1939), as applied to the depository services performed by the defendant Bank, is not an unlawful interference with an instrumentality of the United States; that the following quoted paragraphs or sections numbered 10 and 27 of the rules, regulations and interpretations, prescribed and published pursuant to the said Act by the plaintiff on or about June 10, 1937, and republished, as amended, on October 22, 1937, with respect to depository services performed by the defendant Bank, are proper and valid:

"10. Banks. Services rendered or performed by Banks were included in the Act. It now appears that the law is invalid as applied to National Banks.

Following the general principle of law and taxation now established, to the effect that where a tax statute, intended to apply statewide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"27. Depositories. Such services rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor." That the said depository services performed by the defendant Bank are not exempt from the application of the said Act under the provisions of Section 7 thereof; that the tax created by the Service Tax Act is imposed, not upon the Bank, but upon the user of the service, and does not violate U. S. Revised Statutes, Section 5219; U. S. C. A. Title 12, Section 548; and that the requirement that the Bank collect and pay the same to the State Treasurer, in the manner provided in the Act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the Bank as a governmental instrumentality; and accordingly, the Court should now order, adjudge, decree and declare the law as hereinafter stated;

Now, therefore, the Court doth order, that the order heretofore entered herein overruling the demurrer of plaintiff to defendant's answer and the judgment and decree thereupon rendered and entered herein be, and they hereby are, vacated and set aside, and the said demurrer of plaintiff to defendant's answer be, and hereby is, sustained; and

It is Decreed, Declared and Adjudged:

1. That the services performed by the defendant Bank in operating safety deposit boxes and vaults, as described in the pleadings herein, are not exempt from taxation under

the said Service Tax Act of Colorado; that the said services are taxable pursuant to the terms of the said Act and within the provision of the said Act governing depositories, and are within the said paragraphs or sections numbered 10 and 27 of the said rules, regulations and interpretations, and they, as well as the said Act, relating to the said depository services, are proper and valid, in all respects, as to the duties, burdens, responsibilities, liabilities, fines and penalties imposed upon the Bank, in performing the said depository services, to collect and account for, and to pay the said tax.

Done in open court this 12th day of September, 1939.

By the Court:

ROBERT W. STEELE,
Judge.

EXHIBIT "F".

Objections and Exceptions of the Defendant to the Second Declaratory Judgment and Decree and Assignments of Error in Second Cause in Colorado Supreme Court.

The Colorado National Bank of Denver, defendant above named, by its attorneys, objects to the entry of the presented judgment and decree for the following reasons, to-wit:

I.

That by said judgment and decree the Court will decide this cause in favor of the validity of the Colorado Public Revenue Service Tax Act when, in law, the said Act is repugnant to the Constitution and laws of the United States insofar as the said Act affects the defendant Bank.

II.

That it will deny to the defendant Bank rights, privileges and immunities specially set up in the answer of the defendant Bank and in its arguments, and claimed by it under the Constitution, statutes of, and authority exercised under, the United States.

III.

That the said judgment and decree, and the findings and conclusions therein made, are contrary to the law, and to the material facts pleaded and admitted by the said demurrer, in each and all of the following particulars, to-wit:

(1) In holding that the defendant Bank's operation of its safety deposit vaults, as described in its answer, and admitted by the said demurrer, is "aside from and outside its regular business" as a national bank.

(2) In holding that the said services performed by the defendant Bank are not within the exemption of Section 7 of the said Act, providing that "all services rendered or formed which the State of Colorado is prohibited from taxing under the Constitution or the laws of the United States * * * shall be exempt from taxation under this Act."

(3) In holding that the said Act does not violate the Acts of Congress of the United States, and particularly U. S. R. S., Sec. 5219, as amended (U. S. C. A. Title 12, Sec. 548).

(4) In determining and holding that the tax on the defendant Bank's depository services is imposed on the user of the said services, and not on the defendant Bank, and, notwithstanding this, in further determining and holding that the Bank is responsible or liable for the said tax on its said services, whether or not it collects the amount thereof from the users of its said services.

(5) In holding that the said Act, in requiring the defendant Bank to collect the said tax on its said services, and, whether or not collected, to pay the same to the State Treasurer, and otherwise to be subjected to all burdens, liabilities, fines and penalties provided in the said Act, does not impose an unconstitutional or unlawful burden upon or interference with the defendant Bank as a Governmental Agency or instrumentality.

(6) In holding that Section 10 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(7) In holding that Section 27 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(8) In holding that the plaintiff Treasurer need not apply the said Act so as to exempt the defendant Bank, as a Federal Agency or instrumentality, from the said tax, when, as shown by his other rulings, regulations and interpretations of the said Act, he so applies it as to exempt all other Federal Agencies and instrumentalities from the said tax; and in this respect his said application of the said Act amounts to an unlawful discrimination repugnant to the Fourteenth Amendment of the Constitution of the United States, and also to the Constitution of the State of Colorado.

(9) In holding that the said Act may, without the acquiescence or consent of the defendant Bank, conscript it as an agent of the state to collect and remit the said tax on any part of its banking services, or else to be subjected to the burdens, liabilities, fines and penalties which the Act imposes.

IV.

That the said judgment and decree, if entered, will result in a decision repugnant to the Acts of Congress, relating to national banks, adopted pursuant to the Governmental powers conferred upon the Congress by the United States Constitution, and particularly Article I, Section 8, thereof.

V.

That the said judgment and decree, if entered, will result in a decision repugnant to each and all of the following Constitutional provisions (national and state) to-wit:

From the United States Constitution and Amendments:

Art. I, Sec. 10. "No state shall • • • pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be • • • deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

From the Colorado Constitution:

Art. II, Sec. 15. "Private property shall not be taken * * * for public or private use without just compensation."

Art. II, Sec. 25. "No person shall be deprived of life, liberty or property without due process of law."

Art. II, Sec. 26. "There shall never be in this state * * * involuntary servitude except as punishment for a crime, whereof the party shall have been duly convicted."

Art. XII, Sec. 2. "No person shall hold any * * * employment of trust * * * under the laws of the State * * * without devoting his personal attention to the duties of the same."

EXHIBIT "G".

Colorado Supreme Court Decision of January 8, 1940.

The issues presented in this case are in all respects identical with those raised in Bedford, State Treasurer v. Colorado National Bank, 104 Colo. 311 (91 P. (2d) 469), in which our holding was adverse to the contentions advanced by plaintiff in error bank. Consistently with our conclusions therein announced, the judgment here under consideration is affirmed.

Mr. Justice Francis E. Bouck not participating.

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Supreme Court of the United States

October Term, 1939.

No. 719

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF APPELLANT ON JURISDICTIONAL QUESTION.

WALTER W. BLOOD,
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of Denver, Colorado,
Counsel for Appellant.

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Supreme Court of the United States

October Term, 1939.

No.....

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF.

The appellee, in his statement against jurisdiction, has brought in matters new to the appellant's statement as to jurisdiction, and such as appellant could not have anticipated. The appellee's said statement is tantamount to a motion to dismiss and a brief thereon. Inasmuch as he has not filed (and we are informed will not file) either a formal motion to dismiss, or any brief other than his argument in his said statement, and other than his brief upon the merits, we beg leave to file this brief upon the jurisdictional question, and request that the court consider it when determining whether or not to note probable jurisdiction. It may, and, we believe, should, be treated as preliminary to any consideration of the merits; and

it is not our purpose to foreclose the appellee from further arguing or presenting, in his brief upon the merits, or at any argument or hearing of this cause, all matters which he may deem appropriate upon the jurisdictional question. The appellant therefore respectfully moves that, treating the appellee's statement against jurisdiction as a motion to dismiss and brief thereon, the appellant be granted permission to file this, its brief, in opposition thereto.

BRIEF IN SUPPORT OF JURISDICTION.

Preliminary Statement.

For a general understanding of this cause, we respectfully refer the court to our statement as to jurisdiction and to the exhibits attached thereto, some of which we refer to in this argument. The said statement should also be considered as a statement of the case, and as made in this motion to dismiss, and this brief as an argument thereon.

The appellee makes four points:

1. That the statement of the appellant as to jurisdiction does not specify the stage in the proceedings in the court of first instance at which and the manner in which the federal questions sought to be reviewed were raised, as required by Rule 12 of the rules of this court;

2. That the question of jurisdiction has been decided against appellant so as to be res judicata;

3. That the appellant is bound by the Colorado Supreme Court's ruling that its safe-deposit business is not a part of its banking business; and,

4. That there is no substantial federal question.

We answer these in their stated order; but combine the first and second under our first heading and the second and fourth under our second heading.

I.

As to the Proceedings on Removal.

It is true that, within the time required to appear, and when only the Treasurer's petition was on file in the Denver District Court, the bank filed a petition to remove the cause to the District Court of the United States for the District

of Colorado; that the cause went over under the applicable procedure; and that, upon the motion of the Treasurer, it was remanded. The order of remand is in the form customary in Colorado and does not contain any of the findings or conclusions upon which it was based.

The Acts of Congress and the decisions thereon require that certain grounds for removal must appear upon the face of the pleadings filed in the state court—in this cause, the Treasurer's bill of complaint, designated a "petition." (The original petition is not in the record in this court. An amended petition was subsequently filed and is in this record.) One of the jurisdictional requirements for removal is that the amount or value of the thing in controversy shall exceed $3,000, exclusive of interest and costs. (See Judicial Code, Sec. 24, Subd. (1) and Sec. 28; U. S. C. A., Title 28, Sec. 41, Subd. (1) and Sec. 71.) We feel that citations as to this are not needed.

The granting of the Treasurer's motion to remand, upon considering only the Treasurer's said petition, was not a determination that a federal question was not involved, as said pleading did not show (and no showing could then be made) that the amount then accrued and unpaid on the demanded service tax asserted against the bank's safe-deposit business, exceeded $3,000. (See Henneford v. Northern Pacific Ry. Co., 303 U. S. 17, 58 Sup. Ct. 415.) There is, however, no jurisdictional requirement as to the amount upon appeal to this court, as there is upon removals to, and upon commencing suits in, a federal district court. It therefore often happens that cases which can neither be removed from a state court to a federal court, nor commenced in a federal court, may be appealed from the highest court of a state to this court. This is such a case.

We do not mean, by the foregoing, to minimize the importance of this suit. The amount of the tax involved, is, of course, now far in excess of the demanded and

unpaid tax when the Treasurer filed his petition in the state district court on September 7, 1937; and, furthermore, the declaratory judgment and decree, affirmed by the Colorado Supreme Court, unless reversed, establishes liability of the bank to forever pay the tax in the future, so long as the Service Tax Act is in force and effect; and its duration is unlimited.

Neither did the Treasurer's petition show the facts first alleged in the bank's answer from which it follows, as a matter of law, that its safe-deposit business is a necessary and integral part of its banking business under its federal charter.

Though it was intimated in the Treasurer's petition that the bank would raise federal questions (he undoubtedly expected them), the first pleading of the facts raising the federal questions, now asserted, was the bank's answer, filed in the state district court after the remand. Then, and not until then, were they actually raised. But ever since then they have been vigorously presented.

We believe that in part III of our statement as to jurisdiction, we have literally complied, and we know that we have in good faith attempted to fully comply, with Rule 12, and to specify the stage in the proceedings in the court of first instance, and the manner in which the federal questions, sought to be reviewed, were raised. The court of first instance was the state district court, and the first stage of the proceedings in that court was the filing of the answer. In our statement as to jurisdiction we quote parts, and summarize the other parts of said pleadings, and of the subsequent pleadings, and of all pertinent orders entered thereon, and of everything material leading up to and including the final judgment and decree affirmed by the Colorado Supreme Court, from which we have appealed. If anything is omitted it is inconsequential and not material to the errors assigned;

and we believe that more than a sufficient showing is made to convince this court that the federal questions were raised when they first could have been raised by the bank's answer, that the state courts, both district and supreme, had the said questions presented to them, and considered and determined them.

Furthermore, as shown by the record herein, there has been no delay. The final decision of the Colorado Supreme Court was rendered on January 8, 1940, and the appeal was filed in the Colorado Supreme Court, and allowed on January 17, 1940. This shows a diligent desire of the appellant to have its rights reviewed and determined by this court, and is an additional reason why it should not, so to speak, be "thrown out of court" because of any inadvertence or oversight of its counsel.

No mention was made, in appellant's said statement, of the proceedings on removal, and they were not included in appellant's praecipe, indicating the parts of the record to be certified, because appellant did not assign the remand as error. We believed, and now believe, that they are not material to this appeal. After the remand, and the filing of the bank's answer in the state district court, the Treasurer demurred, and the parties stipulated to stand on their said pleadings. The stipulation is summarized in appellant's said statement, and is included in the printed record in this court. The purpose of the stipulation was to expedite the final determination of this cause upon its merits.

In our opinion, it would have been a breach of faith, and it would have violated the spirit of the said stipulation, to have assigned the remand as error. So far as the United States District Court was concerned, as is well known, no appeal could have been taken from the remand order. We know of no reason, and none has been called to our attention, why the bank could not, after the

remand, acquiesce in it, and defend the cause upon its merits. That is what it did. It seems to us that the Treasurer should not now contend that the bank should have relied further upon a matter of procedure.

For the reasons above stated we submit that the appellee's first and second reasons, assigned in his statement opposing jurisdiction, are wholly insufficient for a dismissal of the appeal.

II.

The case draws in question the United States Constitution and laws, and the Colorado Court decided substantial federal questions arising under the Colorado Service Tax Act.

The appellee's statement, that the validity of the Colorado Service Tax Act is not in question, is contradicted by the pleadings and other matters of record in this cause. In paragraph numbered VIII of his verified amended petition, he alleges:

> "The nature of the controversy (between him and the bank) is that the act in naming banks was, in effect, imposing a tax upon the banks in conflict with the federal laws, *and hence invalid as to banks.*" (Italics are ours.)

The bank in paragraph numbered 5 of its answer admitted this allegation, and thereafter alleged, in detail, the facts showing why the act is invalid as against the bank unless it should be held that the state is prohibited under the Constitution and laws of the United States from taxing any of the bank's services. The district court, on June 8, 1938, rendering a written opinion, by its first decree held that the said prohibition applies. This, the Colorado Supreme Court at first affirmed without written opinion, the participating judges being divided three to three. All of these matters appear in appellant's statement as to juris-

diction, as well as in the record. The Treasurer petitioned for a rehearing, and we quote from his said petition on file in the Colorado Supreme Court, the following:

> "The primary purpose of this action was to obtain a judicial interpretation of the meaning of certain provisions in the Public Revenue Service Tax Act of 1937. Specifically, the interpretation sought was, whether or not the burden of the tax imposed by the act is upon the one performing the service or upon the consumer or user of the service, *and whether or not the duty of collecting such service tax imposes upon an agency of the United States Government an unconstitutional burden.* The equally divided opinion of this court, without written opinion, leaves us without any clear and adequate judicial interpretation of the questions raised.
>
> . . . . . .
>
> "If the service tax is judicially held to be imposed upon the consumer or user of the service, as above indicated, then the other sole remaining question would be whether or not the duty of collecting and remitting the tax would be an unconstitutional burden upon the national bank. *Such a question would be one subject to review by the United States Supreme Court, and for such purposes a clear and concise opinion of this court should be given.*" (Italics are ours.)

The rehearing was granted, and thereafter the Colorado Supreme Court reversed the first decree by a four to two decision, one of the three justices who had been for affirmance not then participating. This opinion is attached as an exhibit to the appellant's said statement and is also in the record herein, and is reported as *Bedford, Treasurer, v. Colorado National Bank*, 104 Colo. 311, 91 Pac. (2d) 469, and holds that the state is not prohibited by the United States Constitution and laws from taxing the

bank's safe-deposit services and that, as to burdens imposed, the act is valid against the bank. These are federal questions. It is true that the Colorado Supreme Court also held that the safe-deposit business of the appellant national bank is not part of its banking business. This also is a federal question, and depends upon the proper construction and application of the National Banking Act, which defines the charter powers and business of the appellant. The state supreme court also held, in its said opinion, that the appellant national bank is not the taxpayer under the service tax act "unless it refuses to comply with certain terms of the act." And this raises the federal question as to whether a state may tax a national bank contrary to R. S., Sec. 5219, as amended, if the bank does not do what the state demands.

All of these questions have been inherently present in the case and considered from its inception. The pleadings, the two decrees, and written opinion of the state district court, and the three decisions of the state supreme court are attached as exhibits to appellant's said statement, and are also in the record in this cause. Of the one judge and seven justices who have heard this case in the state courts upon these federal questions, four have upheld the bank's claim of federal immunity, and four have denied it. Questions first decided one way by a state district court and first affirmed by a state supreme court, though later reversed, must be substantial, and we submit, being federal questions, are entitled to further argument in this honorable court. This is especially true because this court's decision upon them will affect every national bank having a safe-deposit department in Colorado, and unless this court, as the court of last resort, decides them in this suit, other national banks, who are not parties to this cause and are not bound by the state court judgment, will not be foreclosed from litigating these same questions in the federal courts.

We expect to contend, upon the merits, within our assignments of error (1) that under the Acts of Congress the safe-deposit business of the appellant national bank is a part of its banking business (2), that the service tax act is a burden, and the tax thereunder is a burden, on appellant's banking business, even if the tax be payable or paid by the user of such services, and (3) that the state is prohibited from taxing the bank or its business, it is immune from such taxation, and unless such immunity be recognized, *the act is invalid as to it.* We have so contended in the state courts; and we have thus relied and still rely upon federal immunity. The following cases hold that this court has jurisdiction when such an immunity is in good faith asserted, even though the immunity may be denied by this court, and also that such jurisdiction prevails when invalidity may occur if the act be applied to a federal agency or instrumentality, but may not occur if not so applied:

Clallam v. U. S., 263 U. S. 341, 44 S. Ct. 121.
Logan, etc. Bk. v. Townsend, 139 U. S. 67, 11 S. Ct. 496.
Calif., etc. Bk. v. Kennedy, 167 U. S. 362, 17 S. Ct. 831.
Weston v. Charleston, 2 Pet. 449.

There are many other like decisions. In addition, we might cite the numerous cases brought to this court upon appeal (formerly writ of error) holding unconstitutional state statutes burdening or taxing federal agencies and instrumentalities, as does the Colorado Service Tax Act, unless the state statutes are not so applied. Some of them are cited in our statement as to jurisdiction. We expect to cite many of them in our brief on the merits; but do not cite them now because we believe that argument on the merits should be withheld until the appropriate time.

To sustain this court's jurisdiction, we rely also on *Gully v. First National Bk.*, 299 U. S. 109, 57 S. Ct. 96,

cited by the appellee. Though the court held in that case that jurisdiction was lacking, in the first part of the opinion the court comprehensively reviews the essentials of jurisdiction, and prescribes certain tests or guides. The cause at bar meets all of them. Note the following: "The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

As an example of the applicability of that test to this cause, we present this: That if the Banking Act be construed as authorizing national banks to operate safe-deposit departments, then that business is a part of their nationally chartered banking business and franchises; and if the Constitution and Acts of Congress, and particularly R. S., Sec. 5219, as amended, prohibit states from taxing national banks or their property, business or franchises, except as in that section provided, then the immunity from the service tax act for which the appellant national bank contends, will be supported. The cited case did not hold that jurisdiction is lacking in such a cause as this. It held, instead, that in that particular case the question was whether it was removable because it appeared from the complaint, only, that a national bank had, by contract, assumed and agreed to pay the taxes of another national bank, when, from all that appeared, the failure of the defendant national bank to perform its contract may have been for any number of reasons not involving any federal question.

We do not consider *Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273, cited by appellee, as controlling, because the immunity asserted in that case was only *implied*. In this cause it is an *expressed* immunity. *Federal Land Bk. v. Crosland*, 261 U. S. 374, 43 S. Ct. 385, and *Pitman, Clerk, v. H. O. L. C.*, 60 S. Ct. 15, are more in point. They involved, as does this cause, *congressional grants of immunity*.

Therefore, as to the last two points assigned by appellee in opposing jurisdiction, we respectfully submit that several federal questions are necessarily inherent in this litigation and that they are so substantial that the state district court and state supreme court were compelled to and did decide them, and further, that their determination by this court should be had for the benefit of the appellant national bank and for the final settlement of these questions affecting all other national banks in Colorado operating safe-deposit departments.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1939.

No. 719.

THE COLORADO-NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF APPELLANT.

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Supreme Court of the United States

October Term, 1939.

No. 719.

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

Jurisdiction is invoked in this cause upon an appeal from the judgment of the Supreme Court of the State of Colorado in a suit where is drawn in question the validity of a statute of the said State on the ground of its being repugnant to the Constitution or laws of the United States, and the said state court decision was in favor of its valid-

ity. (Judicial Code, Sec. 237, as amended, U. S. C. A., Title 28, Sec. 344.)

The statute is known as the Colorado Public Revenue Service Tax Act of 1937, now found in Session Laws of Colorado, 1939, Chapter 158. It is lengthy, and we have therefore copied it in the Appendix hereto.

Briefly, the said service tax act levies and imposes upon specified services a tax of two per cent of the amount paid for such services, or two per cent of the value thereof. Among the services taxed are "services rendered or performed by any person engaged in any of the following businesses: * * * banks, finance companies; trust companies and depositories; * * * and any other business of a similar nature in which services (not professional) are performed on a price or fee basis." The act also provides that there shall be exempt from taxation under it "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States." (See Sec. 7 (a).)

With reference to this exemption provision, the State Treasurer, by his rules, regulations and interpretations, held that the State is prohibited, by Federal authority, from taxing all services performed by national banks (as well as State), and all of their services are, therefore, exempt from taxation, except that safe-deposit services are not a banking function, and so are taxable.

By another provision of the act, the term "taxpayer" is defined to "mean any person obligated to account to the State Treasurer for the tax collected or to be collected or due the State under the terms of the act." By other provisions, also, one rendering or performing taxable services, among other things, is obligated: to procure a license to conduct his business; to make returns and account to the State Treasurer; to charge the user of services for the tax; and himself to pay the tax, less three per cent of its amount, whether or not collected from the

user. In addition, fines and penalties, civil and criminal, are provided for defaults and delays, a first and prior lien is imposed upon all of the property of the performer of services, to secure his payment of the tax to the State, whether or not he collects it from the user; and distraint may be had against him as the "taxpayer."

This action was commenced in the District Court of the City and County of Denver, Colorado, by Homer F. Bedford, as Treasurer of the State of Colorado, the plaintiff, against The Colorado National Bank of Denver, the defendant. It was brought under the so-called "Uniform Declaratory Judgments Law." (1935 C. S. A., Ch. 93, Sections 78 to 92.) Other defendants were originally included, but the suit was later dismissed as to them.

The purpose of the suit was to test the applicability and validity of the said Service Tax Act as against the appellant national bank, and on behalf of the Treasurer to procure a decree that the bank's safe-deposit services are subject to the tax imposed by the act, that the act is valid as against a national bank, and that the bank must pay the said tax. It was the purpose of the bank's defense to procure a decree that the state is prohibited by the Constitution and laws of the United States from taxing the bank's services, and that the act, if applied to the bank's services, is invalid as repugnant to the Federal Constitution and laws.

The appellant national bank is not seeking any advantage over state incorporated banks. In this respect it agrees with the ruling of the Treasurer, that, under Colorado law, if the act is, in any respect, inapplicable or invalid against the national banks, the same ruling must apply to state banks.

The questions presented in this brief were raised by the Treasurer's Amended Petition (R. 1), the bank's answer thereto (R. 5), and the treasurer's demurrer to the said answer (R. 12). The parties stood upon their said pleadings. The District Court first held for the

bank, overruled the Treasurer's demurrer, and entered a judgment and decree accordingly (R. 16). Questions of law only, and no questions of fact, are involved.

As to this judgment and decree in favor of the bank, the Treasurer procured a review by a writ of error in the Supreme Court of the State of Colorado. The cause on error was first heard by six Justices sitting *en banc*, the seventh Justice not participating, and resulted on December 27, 1938, in an order of affirmance because the six Justices were equally divided (R. 18). Thereafter, and with the January, 1939, term of the said Supreme Court, a new Justice came on the bench, and a petition for a rehearing by the Treasurer was then granted. Additional arguments were then made and additional briefs filed in due time, and on April 17, 1939, the said Supreme Court handed down its decision and opinion, which has now become final, reversing the District Court and remanding the cause for further proceedings in harmony with its said opinion. In the consideration of the cause on rehearing, one of the Justices who had been in favor of the affirmance of the decision for the bank did not participate, and the new alignment of the court consisted of the three Justices who had been in favor of a reversal and the new Justice who went on the bench at the January, 1939, term, deciding for a reversal and the two Justices who had before participated and been for an affirmance dissenting, the other Justice who had been for an affirmance not participating. This opinion is reported under the title of *Bedford, Treasurer, v. The Colorado National Bank*, 104 Colo. 311, 91 Pac. (2d) 469, and is in the Record herein at page 19 et seq.

For want of a final judgment (See *Hinderlider v. La Plata River, etc., Co.*, 291 U. S. 650, 54 S. Ct. 557, and cases there cited), no appeal was then sought to the United States Supreme Court, and the case was remanded to the District Court, for further proceedings and the entry of a final judgment.

Upon the remand, the Treasurer caused the first declaratory judgment and decree to be vacated, the order overruling his demurrer vacated, his demurrer sustained, and presented the second and final declaratory judgment and decree (R. 35).

Upon the presentation of the said second judgment and decree, the bank objected and upon its entry excepted (R. 32), and its objections and exceptions are carried forward into the assignments of error upon this appeal.

The bank thereupon by writ of error procured a review in the Supreme Court of the State of Colorado of this last judgment and decree in the cause in the said court entitled The Colorado National Bank of Denver, a national banking association, Plaintiff in Error, v. Homer F. Bedford, as Treasurer of the State of Colorado, Defendant in Error, and numbered 14684 on the docket of the said Supreme Court.

On January 8, 1940, the Supreme Court of the State of Colorado handed down its decision (not yet reported) in the second cause on error (R. 41). This decision of January 8, 1940, and the judgment rendered in the Colorado Supreme Court thereon is the last and final judgment and is the judgment from which the bank is prosecuting this appeal.

Amended Petition for Declaratory Judgment.

The Treasurer's amended petition (R. 1) alleged, among other things, the following:

Par. IV. That the bank is a national bank;

Par. VI. That the State Treasurer had properly promulgated rules, regulations, and interpretations, of which provisions numbered 10 and 27 read:

> "10. BANKS. Services rendered or performed by banks were included in the act. It now appears

that the law is invalid as applied to national banks. Following the general principle of law and taxation now established to the effect that where a tax statute intended to apply state-wide to all banks, if invalid, as to national banks is invalid as to all state banks, the service tax is therefore invalid as to all banks, state and national. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"27. DEPOSITORIES. Such services rendered as the furnishing of safety vaults by depositories or banks come within the act, and the tax applies to the charge made therefor" (R. 2).

That the Treasurer had on July 27, 1937, and again on August 27, 1937, demanded of the bank, and it had refused, to collect or pay, the said service tax on its safe-deposit services, "or in any manner comply with said law."

Par. VII. That the bank is rendering depository services, taxable under the said law and regulations, which are reasonable, proper, and within the law, and the bank is "responsible and liable for said tax, whether collected from its customers or not, in the manner provided in the said act."

Par. VIII. That an actual controversy exists, because of the foregoing, and "the nature of such controversy is that the act in naming banks was, in effect, imposing a tax upon the banks in conflict with the federal laws and hence invalid as to banks" (R. 4).

Par. IX. That the Treasurer demanded and continues to demand that the bank "failing and refusing to so collect such tax (meaning the two per cent tax on its safe deposit services) from its customers, be held responsible and liable therefor in the manner provided, whether collected from its customers or not" (R. 7).

The petition prayed an adjudication that the bank's safe deposit services are taxable and that the act is valid as to the bank with respect to the said services, and for other relief.

The Bank's Answer.

The bank answered (R. 5) alleging among other things:

Par. 2. That it is an agency or instrumentality of the United States.

Pars. 3, 4 and 5. That it admits the demands, refusals, and controversy above mentioned, arising because the bank is a national bank.

Par. 6. That the bank's safe-deposit business is a part of its banking business; and the answer alleges in detail the facts relating to the incorporation of its vaults in its banking house, taxed with its fixtures as real estate, the bank's operation thereof itself, and not by a subsidiary company, with the supervision of the Comptroller of the Currency over its operation of that part of its business and his consideration of the pertinent expenses and earnings.

Par. 7. "That under and pursuant to the permission granted by the United States Revised Statutes, Section 5219, as amended (U. S. C. A., Title 12, Section 548), the State of Colorado has by law elected to tax and is taxing the Bank, on its net income, from the period commencing July 1, 1937, and that the said state, and political subdivisions thereof, have taxed and are taxing the Bank's real property to the same extent, according to its value, as

other real property is taxed; and that prior to July 1, 1937, the said state, and its political subdivisions, taxed the shares of the said bank under and pursuant to the first method of taxation granted and permitted by the said Section 5219, as amended."

Par. 8. "That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both."

Par. 9. That the bank is exempt from taxation under the Service Tax Act because of the provision thereof reading, "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt"; and if not exempt, the act is unlawful and unconstitutional, the answer then setting forth the detailed reasons of repugnancy to the Federal Constitution and laws, and especially because: (a) the bank is the "taxpayer," (b) the tax is on its banking business, (c) the bank must procure a license to conduct its business or be guilty of a crime, (d) fines and penalties are imposed upon it, (e) unless the bank makes returns, the State Treasurer may make them and fix the amount of the tax payable by the bank, (f) the act gives the State a first and prior lien on all of the assets of the bank contrary to Revised Statutes, Section 5242 (U. S. C. A., Title 12, Section 91), and (g) the act makes it criminal for the bank to refuse to pay the tax or to comply with the act from time to time (R. 8):

"That the bank, as a national bank, is a governmental agency or instrumentality of the United States; that the plaintiff in enforcing, or attempting to enforce, the said service Tax Act as to the bank, as hereinbefore alleged, is imposing a tax against the bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his

rulings, regulations or interpretations with respect thereto is seeking to deprive the bank of a right, privilege or immunity secured to it by the Constitution of the United States (R. 10); and

That it is discriminatory and improper for the Treasurer to attempt to apply the act to the bank's deposit services, when he has admitted and conceded that all of its other banking services are exempt from taxation under the act.

And the bank prayed that the court "determine and declare that under and by virtue of the Constitution and laws of the United States • • • all services performed by the bank, including its depository services, are exempt from tax under the Public Revenue Service Tax Act of 1937 of Colorado."

The Treasurer's Demurrer.

The Treasurer demurred (R. 12), generally, to the above answer, and the parties stipulated (R. 11) that they would stand upon their above pleadings.

The First Declaratory Judgment and Decree.

The District Court heard the demurrer and decided it against the Treasurer, and rendered a decree from which we quote the following:

> "That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults are incident to, and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service

tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937, the defendant bank as the one rendering or performing such services would be the taxpayer, or, if not, would be burdened by such a tax; and that, therefore, the said services are by Section 7 of the said act expressly exempt from taxation under it as 'services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado'" (R. 16).

The Second Declaratory Judgment and Decree.

After the reversal by the Colorado Supreme Court of the foregoing, the District Court, upon remand, entered its Second Declaratory Judgment and Decree (R. 35) in favor of the Treasurer, over the bank's objections and exceptions, which are carried forward into the assignments of error upon this appeal. The Second Judgment and Decree found, and concluded as a matter of law, and decreed, that the Service Tax Act:

"As applied to the depository services performed by the defendant bank, is not an unlawful interference with an instrumentality of the United States; that the following quoted paragraphs or sections numbered 10 and 27 of the rules, regulations and interpretations, prescribed and published pursuant to the said act by the plaintiff on or about June 10, 1937, and republished as amended, on October, 22, 1937, with respect to depository services performed by the defendant bank, are proper and valid; (Copying the said sections as set out in the amended petition, supra, at pages 5 and 6.)

"that the said depository services performed by the defendant bank are not exempt from the application of the said act under the provisions of Section 7 thereof; that the tax created by the

Service Tax Act is imposed, not upon the bank, but upon the user of the service, and does not violate U. S. Revised Statutes, Section 5219; U. S. C. A., Title 12, Section 548; and that the requirement that the bank collect and pay the same to the State Treasurer, in the manner provided in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the Bank as a governmental instrumentality; and accordingly, the court should now order, adjudge, decree and declare the law as hereinafter stated;

"NOW, THEREFORE, THE COURT DOTH ORDER, that the order heretofore entered herein overruling the demurrer of plaintiff to defendant's answer and the judgment and decree thereupon rendered and entered herein be, and they hereby are, vacated and set aside, and the said demurrer of plaintiff to defendant's answer be, and hereby is, sustained; and

"IT IS DECREED, DECLARED AND ADJUDGED:

"1. That the services performed by the defendant bank in operating safety deposit boxes and vaults, as described in the pleadings herein, are not exempt from taxation under the said Service Tax Act of Colorado; that the said services are taxable pursuant to the terms of the said act and within the provision of the said act governing depositories, and are within the said paragraphs or sections numbered 10 and 27 of the said rules, regulations and interpretations, and they, as well as the said act, relating to the said depository services, are proper and valid, in all respects, as to the duties, burdens, responsibilities, liabilities, fines and penalties imposed upon the bank, in performing the said depository services, to collect and account for, and to pay the said tax" (R. 36).

Assignments of Error.

As noted above, the bank, in the Colorado Supreme Court, on writ of error, procured a review of this Second Judgment and Decree. The Colorado Supreme Court, on January 8, 1940, affirmed (R. 41) (but decision not yet reported). From this affirmance judgment the bank has appealed. The bank has assigned six general specifications of error, with several subdivisions thereof (R. 43). All are intended to be urged. Without now repeating them, they are properly condensed into the more general classifications, which, with some of the leading citations thereon, are outlined in the following:

SUMMARY OF THE ARGUMENT.

I.

The immunity of national banks from state taxation.

Under this heading we present the point that national banks may be taxed only as permitted by Congress, and R. S. Sec. 5219, as amended, measures that permission.

R. S. Sec. 5219, as amended (copied in Appendix hereto).

McCulloch v. Md., 4 Wheat. 316, and some subsequent cases to and including.

Bank v. Bennett, 284 U. S. 239, 52 S. Ct. 133.

II.

The safe-deposit business of national banks is authorized by Congress.

Under this heading we present the point that the safe-deposit business of a national bank is a part of its nationally chartered banking business, and is a banking function.

Bank v. Dearing, 91 U. S. 29, and like cases.

R. S. Sec. 5136, as amended.

R. S. Sec. 5228.

National Bank v. Graham, 100 U. S. 699, and like cases.

Bank of Calif. v. Portland, 157 Ore. 203, 69 Pac. (2d) 273.

1. The safe deposit business of a national bank is immune from state taxation, whether the bank or the user of its services be the taxpayer.

Under this subheading we present the point that the Congressional grant of tax immunity extends not only to the tangible property, shares, and income of a national bank, but also to all of its nationally chartered functions, including its safe-deposit business; that the case is entirely different from those in which an *implied* immunity may be claimed or asserted; and that the tax is prohibited even though it be paid or payable by the user of the bank's services.

Fed. Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385.

Pittman, Clerk, v. H. O. L. C., 60 S. Ct. 15 and earlier cases upon Congressional grants of immunity.

Baltimore Nat'l Bank v. Com., 297 U. S. 209, 56 S. Ct. 417.

State Tax Com. v. Baltimore Nat'l Bank, 174 Md. 403, 199 Atl. 119.

2. Under the Colorado Service Tax Act, the bank, as the performer of safe-deposit services, is the taxpayer, and is expressly exempted by Sec. 7 (a) of the act.

Under this subheading we present the point that the express exemption in Section 7 (a) of the act from taxation of safe deposit services, should be applied to avoid Constitutional repugnancy, because, by the Act and decisional law, the bank is, in law, the "taxpayer."

Sec. 7 (a) of the Service Tax Act.

Various other provisions of the act.

New Orleans v. Houston, 119 U. S. 265, and other like cases decided by state courts, under sales tax laws including:

Opinion of the Justices, 88 N. H. 500, 190 Atl. 801.

In re Atlas Television Co., 273 N. Y. 51, 6 N. E. (2d) 94.

Doby v. Tax Com., 234 Ala. 150, 174 So. 233.

Covington v. Tax Com., 257 Ky. 84, 77 S. W. (2d) 386.

III.

The burdens imposed by the act upon performers of services are repugnant to the United States Constitution and Laws.

Under this heading we present the point that, assuming the bank is not the taxpayer and the tax burden is not unlawful, nevertheless the other burdens which the act then imposes upon the bank, as the performer of national banking functions, render the act unconstitutional. From this it follows that the Act should be construed as making the performer of services the taxpayer, and as exempting all intra vires national banking services from taxation.

Various sections of the act.

In re Opinion of the Justices (supra).

Various constitutional provisions.

Allgeyer v. La., 165 U. S. 578, 17 S. Ct. 427, and like cases.

Clement Nat'l Bank v. Vermont, 231 U. S. 120, 34 S. Ct. 31.

IV.

Unlawful discrimination.

Under this heading we present the point that the Treasurer's application of the act, upheld by the State Supreme Court, is discriminatory, and against the United States Constitution.

Bedford, Treas., v. Johnson, 102 Colo. 203, 78 Pac. (2d) 373.

THE ARGUMENT.

I.

THE IMMUNITY OF NATIONAL BANKS FROM STATE TAXATION.

That national banks are federal agencies or instrumentalities created by governmental powers vested in Congress by the United States Constitution, has been recognized and reiterated in all of the cases from *McCulloch v. Md.*, 4 Wheat. 316, to the present time.

It is equally well settled that these banks are immune from state taxation, except as expressly permitted by Congress, and that R. S., Sec. 5219, as amended, now measures the full power of the states to tax them, their shares, property, franchises and business, and expressly excludes the states from all other methods or forms of taxation against them.

The decisions on these general principles are many. We cite a few of the most outstanding of the earlier cases, and some that are recent.

McCulloch v. Md., supra.
Osborne v. Bank, 9 Wheat. 738.
Owensboro National Bank v. Owensboro, 173 U. S. 664, 19 S. Ct. 537, which reviews many of the earlier cases.
Bank of California v. Richardson, 248 U. S. 476, 39 S. Ct. 165.
Bank v. Adams, 258 U. S. 362, 42 S. Ct. 323.
First National Bank of Guthrie v. Anderson, 269 U. S. 341, 46 S. Ct. 135, 138.
Bank v. Bennett, 284 U. S. 239, 241, 52 S. Ct. 133.

The Treasurer conceded this principle, in this litigation, by the following quoted from his brief filed in the Colorado Supreme Court: "*Of course, if the Bank is the one upon whom the tax is imposed, the Service Tax Act in so imposing the tax upon a bank would contravene and be contrary to the Federal Statutes* (R. S., Sec. 5219)."

II.

THE SAFE-DEPOSIT BUSINESS OF NATIONAL BANKS IS AUTHORIZED BY CONGRESS.

Another principle, now axiomatic, is that national banks have such powers as are defined in the Acts of Congress and such as are necessary or implied for carrying into effect the powers expressly granted. This is clearly stated in *Bank v. Dearing*, 91 U. S. 29:

> "The national banks organized under the Act (the banking Act) are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which exists for creating them *Congress is the sole judge.*
>
> "Being such means, * * * the state can exercise no control over them, nor in anywise affect their operation, *except insofar as Congress may see proper to permit.* Anything beyond this is an abuse, because it is the usurpation of power which a single state cannot give." (Italics are ours.)

We quote the following from *Davis v. Bank*, 161 U. S. 276, 16 S. Ct. 502, 503:

> "The provision of the New York banking law that debts due savings banks by an insolvent bank shall be preferred is repugnant to Rev. St., Secs. 5236, 5242, requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore inapplicable in the case of a national bank.
>
> "National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control

the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

To the same effect is the following from *Easton v. Ia.*, 188 U. S. 220, 23 S. Ct. 288, 293:

> "Congress, having power to create a system of national banks, is the judge *as to the extent of the powers which should be conferred upon such banks,* and has the sole power to regulate and control the affairs of their operations; * * * it must be obvious that their operations cannot be regulated or controlled by state legislation." (Italics are ours.)

From this it follows that if Congress has authorized national banks to conduct a safe-deposit business, Congress being the sole judge as to that necessity, no state or court may say that such a business is not an essential part of the business of national banks.

The safe-deposit or depository business of the appellant national bank is within, and a necessary incident of, its franchise and occupation as a bank. This follows from the Congressional grant of powers, from historical recognition as to the scope of the banking business, and from the adinitted facts in this case. By *R. S., Sec. 5136,* as amended *(U. S. C. A., Title 12, Sec. 24)* it is provided that national banks, among other things, shall have power

> "Seventh. To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking."

and included in this same paragraph is the following:

> "*Provided*, that in carrying on the business commonly known as the safe-deposit business, the association shall not invest in the capital stock of a corporation organized under the law of any state to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus."

The deposit business is also recognized in *R. S., Sec. 5228 (U. S. C. A., Title 12, Sec. 133)*, which provides that after default, and upon notice from the Comptroller, it is unlawful for a national bank to "prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits."

In *National Bank v. Graham*, 100 U. S. 699, this court considered the congressional grant of banking powers, and the historical aspect of what constitutes banking, and at pages 703, 704, approved and quoted *Patterson v. Syracuse National Bank*, 80 N. Y. 82, as follows:

> "The phrase 'special deposits,' thus used, embraces deposits such as that here in question. Patterson v. The Syracuse National Bank, Court of Appeals of New York (recently decided and not yet reported). In that case it was said 'a reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done."

In line with, and in further recognition of, the foregoing are the following excerpts from *Texas Pacific Railway Co. v. Pottorff*, 291 U. S. 245, 54 S. Ct. 416.

> Page 253—"The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the act under which national banks are organized constitutes a complete system for their government. Cook County National Bank v. United States, 107 U. S. 445, 448, 2 S. Ct. 561, 27 L. Ed. 537; California Bank v. Kennedy, 167 U. S. 362, 366, 17 S. Ct. 831, 42 L. Ed. 198; First National Bank in St. Louis v. Missouri, 263 U. S. 640, 44 S. Ct. 213, 68 L. Ed. 486."

> Page 259—"The modern deposit grew out of the older form of deposit in which the fund was held separate and intact, and the sole purpose of the deposit was safe-keeping. Safe-keeping is still a very important function of deposit banking."

To the same effect is *Bank of California v. Portland*, 157 Ore. 203, 69 Pac. (2d) 273 (certiorari denied, 302 U. S. 765, 58 S. Ct. 476), in which the Washington Supreme Court reviewed at some length the historical aspect of the safe-deposit business of banks, and held that it was an integral part of the nationally chartered banking business, and that a city license tax against it was invalid.

In paragraph 6 of its answer (supra), admitted by demurrer, the appellant national bank alleged, generally, that its safe-deposit business "is an incident to or integral part of its banking business, and requisite for the safe and convenient attainment of the purposes for which it was created under the authority and laws of the United States"; and the answer, in support of this general allegation, further alleged the detailed facts such as: the bank's ownership of its banking house, taxed, with its vaults and deposit boxes, as real estate; the construction of its vaults within its banking building, and the use of

part thereof by the bank itself and part thereof for service to its customers; the cost of constructing its vaults with their fixtures; the supervision by the Comptroller of the bank's operation of this part of its business; and his consideration, in determining the condition of the bank, of the value of its vault assets and earnings.

Notwithstanding the foregoing, the State Treasurer determined and ruled that in operating this part of its business, the bank is performing "services aside from and outside its regular banking business"; and then, using this erroneous premise, held this service taxable (see paragraphs 10 and 27 of the Treasurer's regulations, at pages 5 and 6, supra).

So far as we know, there is no decision of any court (other than of the Colorado Supreme Court in this cause) holding that the safe-deposit business of any bank, state or national, is not part of its banking business. Because the Treasurer ruled that all other services of national banks are not taxable we feel that this erroneous ruling, that the safe-deposit business is not banking, was responsible for this controversy and litigation.

The Colorado Supreme Court proceeded as it did upon the assumption that it could determine (and it did determine) that "a depository service rendered by a national bank is purely incidental to, and not a necessary incident to, its banking business," and "Safety deposit business service is clearly separable from the banking business as a governmental instrumentality under the Federal law." (See *104 Colo. 321.*)

It did so, although the law is, as we understand the decisions of this court cited above, that Congress is the sole judge of what are necessary incidents to the national banking business, that the determination of Congress is made by its grant of the power, and that all powers of national banks are granted to them as governmental instrumentalities. Otherwise state authorities might de-

termine that the escrow business, the collection business, the trust business, and many other services of a national bank, other than receiving deposits or loaning of money, are not necessary incidents to the national banking business. Then, instead of Congress, the sole source of national banking powers, being supreme, and establishing a single rule controlling all of the national banks in all of the states, we might have different rules established by different courts in the various states.

We know of no reason to place the depository services of a national bank in a category separate and distinct from all of its other services. As no decisions to the contrary have come to our attention we confidently proceed upon the theory that the safe-deposit or depository business of a national bank is part of the business or occupation which a national bank is chartered by Congress to conduct.

1. *The Safe-Deposit Business of a National Bank is immune from State Taxation, Whether the Bank or the User of Its Services be the Taxpayer.*

The Colorado Supreme Court also held that the depository services of the bank are taxable under the Service Tax Act, because the bank is not the taxpayer or the one "upon whom the service tax is imposed." (See 104 Colo., pages 313-320, answering the first question posed by the court.)

This was also erroneous because, even so, the tax is on a federal chartered function, business or occupation of the bank. The proper question is: may the service be taxed? To determine who must pay it does not answer the question.

The Service Tax Act provides:

> "Seetion 5. From and after the effective date of this act *there is hereby levied and imposed upon the services specified in this act* and measured by the

amount paid therefor and there shall be collected and paid:

* * * * * *

"(c) *A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses:* * * * *banks, finance companies; trust companies and depositories;* except as to interest on money loaned, stock or commission brokers or agents; and any other business of a similar nature in which services (not professional) are performed on a price or fee basis." (Italics are ours.) (See pages 67 and 68, infra.)

Clearly it is the service that is taxed. The Act is a pure revenue law enacted under the state's taxing power to procure funds for the support of the state government. It does not purport to be founded upon the police, or any power, other than the taxing power, of the state. As determined by the Colorado Supreme Court (*Rinn v. Bedford*, 102 Colo. 475, 476, 84 P. (2d) 827) the tax so levied and imposed is an "excise" tax. Within that general term, it is a "business" or "occupation" tax. In our judgment, if the right to do business is a property right, it is also a property tax. As the service is taxed, and the performance of the service is within the bank's charter powers, its business, occupation and franchise is burdened with the tax, no matter who is required to, or does, pay it.

In *Federal Land Bank v. Crosland*, 261 U. S. 374, 43 S. Ct. 385, it was contended that, because the Land Bank could pass on to borrowers a tax of Alabama (characterized by the Alabama court as a "recording fee") imposed upon the recording of mortgages (which as to the Land Bank had been granted immunity from state taxes by Congress) the tax was valid. But this court said at page 378: "It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference * * *. Whoever pays it, it is

a tax upon the mortgage and that is what is forbidden by the law of the United States."

So, too, in this cause, whoever pays the service tax, it is a tax on the business and occupation, and so upon the franchise of the bank, and "that is what is forbidden."

The last decided case upon this subject is *Pittman, Clerk, v. Home Owners' Loan Corporation*, 60 S. Ct. 15, and we believe it is determinative of this cause. There, too, it was contended that because the federal instrumentality could pass the tax on to borrowers, the tax should be permitted. But this court held to the contrary, and said:

> "Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot 'grant an immunity of greater extent than the constitutional immunity.'
>
> "We assume here, as we assumed in *Graves v. New York ex rel. O'Keefe*, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch v. Maryland*, supra, pp. 421, 422, *Smith v. Kansas Title Co.*, 255, U. S. 180, 208, 209; *Graves v. New York ex rel. O'Keefe, supra.* Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' *McCulloch v. Maryland*, supra, page 426. This power to preserve

necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, Par. 18. *In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. The Shreveport case,* 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g.; *Bank v. Supervisors,* 7 Wall. 26, 31; *Choate v. Trapp,* 224 U. S. 665, 668, 669; *Smith v. Kansas City Title Co.,* supra, page 207; *Trotter v. Tennessee,* 290 U. S. 354, 356; *Lawrence v. Shaw,* 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. *Since Congress had the constitutional authority to enact this provision, it is binding upon this court as the supreme law of the land. Const. Art. VI."* (Italics are ours.)

It is interesting to observe that in the present cause the Colorado Supreme Court undertook to overrule Congress, though this court says that Congress' action in such a matter is binding upon it.

The two above cases reaffirm a doctrine often expressed throughout the history of this court. In *McCulloch v. Md.*, supra, the tax declared illegal was in form an excise tax relating to the bank's services in issuing notes, etc. At the very end of its opinion the court said (page 436):

"This is a tax on the operation of the bank, and is, consequently, a tax on the operation of an instrumenality employed by the government of the Union to carry its powers into execution."

So too, in the present cause, the service tax is on the operation of the bank's safe-deposit department, and is prohibited.

This same contention, that the burden of the tax could have been passed on to others, and that, for such a reason, it should have been valid against the Federal instrumentality asserting immunity, could have been made in other cases. *Western Union Telegraph Co. v. Texas,* 105 U. S. 460, is an example. The Telegraph Company was a federal agency or instrumentality in certain respects, and was engaged in interstate commerce. Texas undertook to tax its messages, even though sent in these two fields, at the rate of 1 cent for a "full message" and of ½ cent for less than a "full message." This court held the tax illegal and said (page 465):

"Where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. * * * Clearly, * * * this must be a tax on the messages."

In *Brown v. Md.,* 12 Wheat. 419, a state law providing a license tax on the sale of imported packages in their original form, was held illegal as an interference with foreign commerce, and the court said at pages 444, 448:

Page 444.—"It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he

deals, or the thing itself is taxed through his person. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

Page 448—"The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce."

Leloup v. Mobile, 127 U. S. 640, also involved state taxation of the Western Union Telegraph Company, and held a license tax imposed on the company was invalid. Pertinent excerpts from the opinion follow:

Page 644—"It is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the Telegraph Company was engaged."

Page 645—"Can a state prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether." • • •

"We fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

The opinion then approves *Brown v. Md.*, supra, and overrules *Osborne v. Mobile*, 16 Wall. 479, and says further at page 648:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax * * * on the occupation or business of carrying it (meaning interstate commerce) on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress" (citing many cases).

California v. Pacific Railroad Co., 127 U. S. 1, 40, 41, is another case of about the same time. It involved the the validity of a state "franchise" tax upon a congressionally created corporation. This court held the tax invalid and said at pages 40, 41:

> "No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise * * *.
>
> "In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden and may be laid so heavily as to destroy the thing taxed, or render it valueless. * * * Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive to the powers of the government, and repugnant to its paramount sovereignty."

The right to carry on a business is a property right. When the right is in a corporation it is within its franchise emanating from the government who charters it. From this, it follows that a so-called license tax, in such a case as this, is, within the meaning of granted immunity, a franchise, occupation or business, and property tax. Additional cases holding such "license" taxes invalid, as against national banks, because they are taxes on a governmental instrumentality, are:

Third National Bank of Louisville, v. Stone, 174 U. S. 432; 19 S. Ct. 759.

Shelbyville v. Bank, 272 Ky. 559, 114 S. W. (2d) 719.

and the often quoted and old case of *Pittsburg v. Bank*, 55 Pa. St. 45, in which the court said at page 48:

> "They (meaning national banks) are mere creations of the national government to whom alone they are responsible, and are as entirely independent of state legislation or state interference as the army and navy, and the mint, and the judicial tribunals of the United States."

As we construe and understand the Colorado Supreme Court's decision in this cause, the court considered the case as though immunity from state taxation would not interfere with the instrumentality's services to the government. It considered the case in the light of:

James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, and

Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466, 59 S. C. 595.

State Tax Commission v. Van Cott, 306 U. S. 511, 59 S. C. 605.

In those cases immunity had not been determined by Congress, and the immunity, if any, must be implied from actual governmental interference. Cases of *implied*

immunity and *expressed* immunity are entirely different. In the latter cases, as exemplified by *Pittman, Clerk, v. H: O. L. C.*, supra, Congress determines the governmental policy, its determination is controlling, and any court's inquiry into the question of *actual impairment* of the governmental instrumentality's services to the government is of no avail. This is a case of the latter kind.

The difference between these two kinds of cases or situations is illustrated by *Baltimore Nat'l Bank v. State Tax Com.*, 297 U. S. 209, 56 S. Ct. 417, and *State Tax Com. v. Baltimore Nat'l Bank*, 174 Md. 403, 199 Atl. 119. In the first case, a national bank asserted an *implied immunity* from state taxation as to preferred shares held by Reconstruction Finance Corporation. This court, affirming the Court of Appeals of Maryland, refused to recognize the asserted immunity. Thereupon, by an act of March 20, 1936 (U. S. C. A., Title 12, Sec. 51 d), Congress granted an immunity from taxation as to shares of national banking associations held by Reconstruction Finance Corporation. The taxing authorities of Maryland still attempted to tax them; and in the second case, the Court of Appeals of Maryland held that the congressional grant of immunity controlled.

By numerous decisions in an unbroken line, some of them cited above, R. S., Sec. 5219, as amended, has been held to expressly exclude all state taxation of national banks, except to the extent and in the form in the section provided. Cases on implied immunity are not in point. The Colorado court said (104 Colo. page 323), "There is nothing in the Service Tax Act which incapacitates the bank from discharging its duties to the government," and; "that, after all, is the test." From this it is apparent that the Colorado court failed to consider the controlling feature of this cause—a Congressionally granted immunity, and thus, perhaps unintentionally, overruled Congress in a matter where it is supreme; and it is also apparent that it did so on the basis of "implied immunity" cases which, in this cause, we submit, are not applicable at all.

We cannot overemphasize the distinction that, in our opinion, is made in the decisions of this court between "implied immunity" cases and the cases where there is a Congressional grant of immunity.

This distinction, which the Colorado Supreme Court overlooked, is exemplified by *McGoldrick, Comptroller, v. Berwind-White, etc. Co.*, 60 S. Ct. 388, decided January 29, 1940. In that case, no Congressional grant of immunity was involved. Instead, immunity from the City of New York sales tax was asserted under Section 8 of Article I of the United States Constitution, declaring that "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states * * *." The majority opinion expressly distinguishes the case from, and prevents its application to, the present cause by this statement: "We can find no adequate ground for saying that the present tax is a regulation which, *in the absence of Congressional action*, the commerce clause forbids." (Italics are ours.) Had there been "Congressional action" forbidding the tax, as there is in R. S., Sec. 5219, as amended, relating to state taxation of national banks, the cited case would have been similar to the present cause. Then, to uphold the tax, it would have been necessary to overrule *Federal Land Bank v. Crosland* and *Pittman, Clerk, v. H. O. L. C.*, both supra, each decided by a unanimous court. Neither of these last two cases is mentioned in either the majority or dissenting opinions, and as the opinion in the Pittman case was also rendered at the October, 1939, term of court, it must follow that this court treated the McGoldrick-Berwin-White case as wholly different from the other two.

Very significant is the following quoted from the McGoldrick-Berwin-White case:

> "If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor,

it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser."

Although the foregoing is quoted from the dissenting opinion, there is nothing in the majority opinion in disagreement with the quotation or the thought expressed by it. As we read the case, the disagreement was upon other principles.

This last quotation is upon, and brings us to, our next subject.

2. *Under the Service Tax Act of Colorado, the bank as the performer of safe-deposit services is the "taxpayer," and is exempted by Section 7 (a) of the act.*

Section 7 (a) of the act provides:

> "All services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, * * * shall be exempt from taxation under this act."

Thus the Act, by its own wording presents a federal question, final determination of which must rest with this court; and, in considering and answering this question, this court must necessarily further consider how and in what respects the act affects this federal agency and instrumentality, and its position and status under the act, in order to apply or withhold application of the federal prohibition. This is true, also, because Colorado has not been at all consistent in either its characterization, interpretation, or application of the act.

In paragraph 10 of his rules, regulations, and interpretations of the act, the Treasurer in considering Section 7 providing the above exemption, held that the law is *invalid* as applied to national banks (see pages 5 and 6, supra), undoubtedly, because they are federal agencies or instrumentalities. But in the same paragraph, he reserves from invalidity the depository services of national banks. The

Colorado Attorney General, by paragraphs VII and IX of the amended petition in this case (R. 3 and 4), took the same position—that the only tax which the bank is required to collect or pay for services performed by it in its individual capacity, as distinguished from a trust capacity, is upon its depository services. And the Colorado Supreme Court held that this paragraph 10 and the said ruling are proper and valid and affirmed the District Court's judgment and decree so providing, and in addition required the bank to collect, account for, and *pay the said tax upon depository services, only, because the "bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act."* (See 104 Colo. 320, 91 Pac. (2d) 473.)

Here we have an anomaly—the Colorado court adjudicating the *validity* of the tax on the bank's depository services because, in its opinion, the bank is not the taxpayer, and adjudicating the *invalidity* of the tax on all of the other services of the bank, because it is a federal instrumentality or agency, even though as to all services (depository and all others) the bank is a federal agency or instrumentality and its statutory tax burden is, in each instance, identical. In other words, as to depository services, the act is valid, but, even though the identical circumstances and assigned reasons for validity exist as to all other services, as to them the act is invalid. It seems to us that this is a haphazard discrimination against depository services without anything in the act, or in any law that we know of, to call for it.

The bank is either the taxpayer or not the taxpayer as to all of its banking services. No discrimination can be made to depend upon the particular kind of banking service performed. The act purports to tax all banking services. The act says in Section 5: "There is hereby levied and imposed upon the services specified in this act * * * a tax equivalent to two per cent of the value of serv-

ices rendered or performed by any person engaging or continuing in any of the following businesses: * * * banks, finance companies; trust companies and depositories."

It also purports to exempt all services which the State is prohibited from taxing. A very good and sufficient reason for applying this exemption to all of the bank's services, including depository services, is because, by the Act, the bank is made the taxpayer, and by the United States Constitution and laws the state is prohibited from taxing it.

Within the authority of *Federal Land Bank v. Crosland*, supra, and the cases there cited, this is a case where this court is not bound by the state court's ruling that the bank is not the taxpayer. In the cited case, this court held that it was not bound by the state court's determination that the required payment was a *"recording fee,"* itself considered the State statute and determined that it was a *"tax"* on mortgages. A state court may not circumvent the United States Constitution and Supreme Court decisions by an erroneous "characterization" of any part of a state statute, challenged as repugnant to the Constitution.

We, therefore, respectfully urge this court's consideration and determination of whether or not, under the Service Tax Act, the bank as the performer of depository services is the taxpayer. Note the following provisions of the Service Tax Act (printed in full in the appendix to this brief):

(1) That the taxpayer is defined as the one "obligated to account to the State Treasurer for taxes collected or to be collected or due under the terms of this act" (see Section 2 (e)), and by subsequent provisions it is the *performer* and not the *user* of services who is so obligated.

(2) That the taxpayer may take credit against subsequent taxes due from him, when the charges for his service, as to the tax paid, are "represented by accounts found

to be worthless and actually charged off for income tax purposes" (see Section 2 (h)).

(3) That it is unlawful for one performing a taxable service to do so without first procuring a license (see Section 4 (a) (b) and (g)), but the Colorado Supreme Court has held this provision is invalid as against the bank, and is separable from the other provisions (104 Colo. 315-316, 91 Pac. (2d) 471).

(4) That the tax is "*levied and imposed upon the services specified in the act,*" including "services rendered or performed by any person in * * * the business of * * * banks, finance companies; trust companies and depositories" (see Sections 5 and 5 (c)).

(5) That the *performer* of services is liable and responsible for the tax imposed upon his taxable services. (See Section 3, making it a misdemeanor "for any person performing said services to fail to collect * * * the tax levied by this act"; and see Section 6, providing that "every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said 2% tax imposed and payable upon his total taxable services rendered or performed"; and see Section 9 (b) imposing upon the performer of taxable services a penalty of 10% and interest at 1% per month if he should fail to pay the tax when due; and see also Section 12 (g) providing that the Treasurer may sue "the vendor" and "recover at law the amount of such tax, penalty and interest.")

(6) That the one performing taxable services must make returns, and should he fail to make a return, the Treasurer may make an estimate, and thereon compute and assess the tax due against the "taxpayer" (the performer) (see Sections 6 (a) and 12 (b)).

(7) That contrary to R. S., Section 5242 (U. S. C. A., Title 12, Section 91), the act imposes a first and prior

lien upon all property of the performer to secure the payment of the tax by the performer upon all of his taxable services (see Section 11 (a)).

(8) That for the unpaid "taxes, penalties, and interest," the Treasurer may file a notice of lien against all of the real and tangible personal property of the performer of services, called "the taxpayer," and this lien may be foreclosed by sale upon a warrant of the Treasurer against the property of "the tax debtor" (Sections 12 (c) and (d)).

(9) That the tax imposed by the act is in addition to all other licenses and taxes (Sec. 16).

(10) And it is unlawful and a misdemeanor for "any person rendering or performing services" to refuse to make the required returns and to "fail and refuse to make payment of any taxes * * * due the state," and the *performer* may be punished by fine or imprisonment, or both (Secs. 17 and 18).

It is significant that the performer of services, who alone must "account" to the state, is expressly named the "taxpayer," and all remedies provided in the act for the enforcement of collection are directed against the performer and his property. *Nowhere in the act is the state given any remedy against the user of services or against his property.* This feature of the Colorado law is unique. The only remedy at all given against the user is that *the performer* may add the tax to his bill "and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid and shall be recoverable at law in the same manner as other debts" (Sec. 6 (b)). *The state may not even sue the user.* Significant, also, are the Treasurer's allegations that the bank is *liable* for the tax, "*whether collected from its customers or not*" (see paragraphs VII and IX of his petition, R. 3-4); and the District Court decreed (affirmed by the Colorado Supreme

Court), confirming the Treasurer's said position, that the bank is liable "to pay the said tax" (R. 37, and page 11, supra).

As we understand the adjudicated cases upon this subject, the "taxpayer," in the legal sense, under any tax law, is the one who is *primarily liable or responsible for the payment of the tax.* This was directly held in *New Orleans v. Houston,* 119 U. S. 265, 279-280. It appears in that case that the Louisiana State Lottery Company, by a special charter granted by the state, had been exempted from all taxes in excess of $40,000 annually. Thereafter, the state attempted to levy and assess an additional tax upon the shares of the company. The law provided that *the tax should be paid by the company,* and that the company should be entitled to collect the amount thereof, pro rata, from its shareholders. The state contended, as the Treasurer in the cause at bar contends, that the company was not the taxpayer. But this court held that the company was the taxpayer, because of its primary liability, and said, at pages 279 to 280:

> "A tax such as that sought to be imposed upon the company by the appellees, is a tax upon the corporation within the meaning or prohibition of its charter, *because it is compelled to become surety for taxes nominally imposed upon its stockholders and is made liable primarily for their payment; a payment which, in the first instance, must be made out of the corporate property, without other recourse than an action against individual stockholders to recover the amounts advanced on their account.* (Italics are ours.)

In this cause, under the Treasurer's ruling, sustained by the state court, the bank is primarily and absolutely liable (and the user is not) and must pay the tax, out of its funds, to the state; and its only recourse is to sue the user, and, if eventually it is permitted "to charge off for income tax purposes" the amount of the tax so paid and

not collected, then the amount so paid "may be credited upon a subsequent payment of the tax" (see Sec. 2 (h)).

The question has arisen in several states as to who is the taxpayer under various sales tax laws. These laws generally differ from one another, in many important features; but it has been invariably held (1) that the seller is the taxpayer if he is liable for the payment of the tax, whether he collects it or not, from the buyer, and (2) that the buyer is the taxpayer, if the seller's liability is conditioned upon his collection of the tax from the buyer, the seller then being an agent of the state. The Colorado act is in the first above classification.

We might rest our argument of this subject upon the following, which is quoted from *McGoldrick, Comptroller v. Berwind-White, etc. Co.*, supra, except that we have substituted in parentheses, the words "performer" and "user" for "vendor" and "purchaser," respectively:

> "If the *(performer)* must pay the tax whether or not he can recoup the amount from the *(user)* and the tax is assessed against the *(performer)*, it would seem inadmissible to defend the tax on the ground that it is a tax upon the *(user)*."

Some of the cases, in harmony with the above quotation and with the theory and reasoning of *New Orleans v. Houston*, supra, are:

People v. Herberts, 3 Calif. Ap. (2d) 482, 39 Pac. (2d) 829;

Roth Drugs v. Johnson, 13 Calif. Ap. (2d) 720, 57 Pac. (2d) 1022;

West Co. v. Johnson, 20 Calif. Ap. (2d) 95; 66 Pac. (2d) 1211.

National Ice, etc. Co. v. Fruit Express Co., 11 Calif. (2d) 283, 79 Pac. (2d) 380, 383-384;

In re Opinion of the Justices, 88 N. H. 500, 190 Atl. 801;

Pierce Oil Co. v. Hopkins, 282 Fed. 253;
Texas Co. v. Wilkinson, 21 Fed. Sup. 771, 778;
In re Atlas Television Co., 273 N. Y. 51, 6 N. E. (2d) 94;

In the last cited case, the court said:

"We might agree with that conclusion (that the purchaser is the taxpayer) if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. He must file a return of his receipts from sales. Section 5. The duty of payment to the city is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. Section 6. He must pay the tax even if failure to collect is due to no fault of his own. * * *

"It (the city) has imposed a tax as sovereign and to meet a need which concerns the welfare of the state. It has provided that the vendor of property must pay the tax to it. Though the vendor is required, at least in most cases, to collect the tax from the purchaser 'for and on account of the city,' the purpose of that provision is to place the incidence of the tax immediately on the consumer. The city can collect only from the vendor. The vendor's obligation to pay the tax is not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent."

Doby v. Tax Commission, 234 Ala. 150, 174 So. 233, should also be included among the above. We mention it specially because the Colorado Supreme Court cited *Long v. Roberts & Son*, 234 Ala. 570, 176 So. 210, in support of its opinion.

To understand what was held in *Long v. Roberts & Son,* supra, it is necessary to also consider *State Tax Commission v. Hopkins,* a companion case, 234 Ala. 556, 176 So. 210, and *Doby v. Tax Commission.* The question in the Long-Roberts case was whether certain sales which also involved services, were within the Alabama sales tax law. The court, in the Long-Roberts case, adopted the opinion in the Hopkins case and approved and adopted that part of the dissenting opinion of Gardner, J., relating to sales to counties. The court thus expressly approved the Doby case and it said (at page 217 of 176 So.):

> "In the strict and proper sense the tax is on the seller, and he is properly in such a sense to be denoted as the taxpayer. Doby's Case, supra. * * * In the Doby Case, supra, it was expressly stated that the seller is the taxpayer, and he it is who is required to take out the license, make the return, keep the record, and pay the tax to the state tax commission."

Consider now the direct holding and statement of the court in the Doby case. As quoted from 174 So. 235, it is as follows:

> "The retailer is the 'taxpayer,' the person liable to the state for the tax. He is the person required to take out the license under Section 3, the person required to make returns and pay the tax to the State Tax Commission under Sections 5 and 6; the person required to keep records under Section 8; the person on whose personal property a lien is declared as security for the tax under Section 9."

With due respect to the Colorado Supreme Court, we submit that it did not correctly appraise the decisions when it said that the great weight of authority is in the direction of holding that the buyer is the taxpayer, even though the seller is primarily and absolutely liable and must pay the tax to the state, whether he collects it or not from the buyer.

Further evidence of the court's error in this respect is its citation of *Breaux Ballard v. Shannon,* 271 Ky. 553, 112 S. W. (2d) 996, and *Covington v. Tax Commission,* 257 Ky. 84, 77 S. W. (2d) 386.

As the Ballard case follows and approves the Covington case, a consideration of the Covington case disposes of the other. The Kentucky Court very clearly holds that the buyer is the taxpayer because the seller is not required to pay the tax to the state *until he collects it* (quite different from Colorado, where he is *required* to pay it *whether he collects it or not*). Note these excerpts from the opinion in the Covington case in 77 S. W. (2d) at pp. 388-390:

> "In defining 'gross receipts' upon which the tax is exclusively levied, the words are restricted to sales for which the seller has received the consideration, either at the time of making the sale, or by payment of accounts of his customers to whom he extended credit. In other words, no tax is collectible from the merchant or seller until he collects the price of the commodity that he sells while engaged in the activity in which the sale was made. From that provision alone it would seem to appear that the clear import of the statute, and also the legislative intent, is and was to make the merchant or seller only a collector of the tax from his customers, * * *.
>
> "(4) The conclusions we have reached and so far expressed are also authorized and justified from the history of the statute under consideration from the time of its introduction in the Legislature until it was finally enacted in its present form, and which it is competent for courts to consider in construing statutes containing apparently ambiguous language, * * *. We find that it is admitted in briefs, and shown by the journal of the two Houses of the General Assembly, that the statute when first introduced was essentially one imposing the tax levied by it on the *merchant or seller,* and which is shown by the

unamended Section 3 and its various subsections. After the introduction of the act, various groups and organizations opposing its enactment appeared before the two legislative bodies, and to alleviate their objections the act was amended in several particulars, prominent among which was a shifting of the burden of paying the tax from the *merchant* or *seller* to the *consumer* or *buyer*, and which was accomplished by the amendatory provisions we have hereinbefore discussed. In this manner the statute as passed was turned around, so to speak, from the position it occupied when introduced, but without amending some of its sections or parts so as to harmonize with the newly assumed positions, and which produced the ambiguities encountered." (Italics by the court.)

It may be that an answer to this discussed question is unnecessary. The Colorado taxing authorities and court were apparently in a dilemma—on the one hand, if the performer of services should be considered the taxpayer, national banks' services under Section 7 (a) would be exempt from the tax; and, on the other hand, if the user should be considered the taxpayer, the benefit of the above enforcement provisions of the act, and particularly the distraint authorized, would be nullified. The Colorado General Assembly purposely defined the performer to be the taxpayer, so that the state might proceed against the performer and his property for the recovery of sizable sums—the aggregate tax on services to many customers. To proceed against the user would, in all but very exceptional instances, be extremely impractical. Thus, to proceed by distraint against a user of services charged or valued at $10.00, or even $100.00, to recover 20c or even $2.00, would be out of the question. The theory of the General Assembly, gathered from their wording of the act was consistent, logical, and valid. But discarding that theory, and to avoid the dilemma, the ruling was made that the bank, as the performer of services, is not the taxpayer

"unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank (as a performer of services) *it is a taxpayer."* (See 104 Colo. 320, 91 Pac. (2d) 473.)

Thus, a tax burden is *conditionally* imposed upon national banks in Colorado. But the freedom from taxation, except as described in R. S. Sec. 5219, as amended, granted to national banks by Congress and recognized in all the decisions of this court, is *unconditional.* If states are permitted to *conditionally* tax national banks, otherwise than as provided by Congress, new avenues of taxation are open that may lead to unknown destinations.

Furthermore, congressionally exempted federal agencies and instrumentalities may not be so coerced into state taxation. In *Federal Land Bank v. Crosland,* supra, it was contended that liability of the Land Bank for the tax was optional with the bank, and that it would not be liable unless, at its option, it should, though not required, record its mortgages; but this court said:

> "The law of Alabama does make it necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so, it cannot say that it leaves the bank to record or not. *The bank has a choice it is true, but so has one who acts under duress."* * *
>
> "It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end." (Italics are ours.)

So, too, in the present cause, under the Colorado Supreme Court decision, the bank's officers and agents are subjected to fines and imprisonment, and its property to liens and filed notices of liens (of questionable validity, it is true) clouding its titles, and its records to the inspection and subpoena of state officials, *all unless it complies with the act, collects the tax for the state, and unless also it pays the tax to the state, whether collected or not.*

III.

THE BURDENS IMPOSED BY THE ACT UPON PERFORMERS OF SERVICES, AS AGENTS TO COLLECT THE TAX, ARE REPUGNANT TO THE CONSTITUTION AND ITS AMENDMENTS.

The question we will now consider is this: Is it constitutional to provide by law that any party, private or corporate, shall, without his consent, be conscripted, and caused to act, as a tax collection agent for the state, and be involuntarily subjected to any part or all of the duties and civil and criminal liabilities imposed by the act relating to both the performance and nonperformance of the agency? We believe that it is not constitutional; and are especially firm in our belief when the state seeks, under the act, to conscript a *federal* agency or instrumentality to perform such duties.

We start with the premise that the performer of services is not the taxpayer, but, as said in the Colorado Court opinion, "is merely the state's agent to collect." The following are the duties and liabilities then imposed by the act upon the agency:

(1) By Section 3, it is a misdemeanor for the conscripted agent "to fail to collect" the tax;

(2) By Section 4 (a), he must, on pain of being punished as a criminal, procure a license to act as an agent (in the case of banks, the duty to procure a license is deleted from the act by the court);

(3) By Section 6 (a) he must make returns and remit each month except that he may retain 3% of the taxes collected to cover his "*expense* (but no compensation for his services) in the collection and remittance of said tax," and these returns must be made in such manner and upon such forms as the state treasurer may prescribe;

(4) By Section 6 (d), it is unlawful for the conscripted agent to lead anyone to believe that he will not perform his agency nor collect the tax;

(5) By Section 9 (a), if he should, through error, pay less than the amount of the tax due (whether he has collected it or not), he must then, within ten days after written demand, pay the difference with interest at ½% per month;

(6) By Section 9 (b), if his failure to pay the full amount whether collected or not, is negligent or willful, then a penalty of 10% is added, and interest at 1% per month;

(7) By Section 9 (c), (d), (e) and (f), he must submit his books, papers and records to the Treasurer for investigation and himself attend and testify at hearings thereon;

(8) By Section 10, he must keep his books, papers and records for three years;

(9) By Section 11, his property is impressed with a first and prior lien for the payment of the tax, whether collected or not (but as to banks, the validity of this provision is left undecided in the opinion);

(10) By Section 12, at the election of the state, he may be made an involuntary trustee for the state, or he may be sued as for a debt, and judgment may be procured against him for the amount of the tax, whether collected or not; and the Treasurer may file notice of lien and distrain;

(11) By Section 16, the license and tax, imposed by the act, upon the conscripted agent is in addition to all other licenses and taxes;

(12) By Section 17, it is made a misdemeanor for the conscripted agent to refuse to make a return; and

(13) By Section 18, he may be fined $1,000 or imprisoned for six months, or both, for the above or any other misdemeanor as defined in the Act.

The act was adopted, as shown by Sec. 20, purely for revenue purposes. Any exercise of police power is not involved. We are therefore not concerned with those cases involving acts adopted under the police power where, as an incident to the prosecution of a business which a state may police and control, the particular business affected is required to do one or more of the things above specified. The policing and licensing of the gasoline and motor fuel sales business is an example.

Each of the above and other somewhat similar provisions contained in the Service Tax Act were designed to procure revenue and to enable the state treasurer to procure the proper account records and collections.

It is apparent to us that the Colorado General Assembly, in an attempt to design enforceable laws which would procure all possible revenue, and to provide valid enforcement methods therefor, purposely said, in Section 2 (e) of the Act:

> "The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act"

The result of invalidity of even less severe enforcement provisions was directly determined and announced by the Supreme Court of New Hampshire, upon inquiries propounded by the New Hampshire legislature relating to a sales tax law then being considered, in *In re Opinion of the Justices*, 88 N. H. 500, 190 Atl. 801, at pages 804 and 805, as follows:

> "By the bill the tax is placed upon the purchaser. Although the seller is required to guarantee, collect, account for, and pay it, he is also required

to add it to the price of the article sold and may not assume or absorb or refund it. The duty thus devolved upon him to act as the collector of the tax without adequate compensation for the service a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. *It would not be a service incidental to the ascertainment of his own taxes.*

"The situation is not parallel with that of distributors of gasoline and other motor fuels who are required to pay the tax thereon although it is in finality a tax against the ultimate consumer. Such distributors must be licensed (Pub. Laws, c. 104, Sec. 1), and their duty to pay the tax is therefore a term of the license.

* * * * *

"If the bill were redrafted so as to place the tax on the retailer, the objectionable feature of his status as a tax collector would be eliminated." (Italics are ours.)

By expressly stating in the Service Tax Act that the performer is the taxpayer, the Colorado General Assembly did all that they could do to "eliminate" the objectionable feature of attempting to cause the performer to act as a tax collector. By judicial construction, in finding an *implied* intent reversing an *expressed* intent, the accomplishment of the General Assembly is nullified by the state court opinion in this case.

In our opinion, each and all of the enforcement provisions of the Service Tax Act are unconstitutional *if the user of services is the taxpayer* (but not if the performer of services is the taxpayer), because they then violate the following parts of the United States Constitution and Amendments, to-wit:

Art. I, Sec. 10. "No state shall * * * pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be • • • deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1 of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1 of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

Within the above constitutional provisions protecting a person's "liberty," it seems to us is the situation that, when an individual is forced to serve the state, whether it be for a month, a day, or longer, he is to that extent deprived of his right to carry on the calling and lawful occupation of his own choosing; and the authorities so state.

Thus, it was said in *Allgeyer v. Louisiana,* 165 U. S. 578, 17 S. Ct. 427 at page 431:

> "The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will.*" (Italics are ours.)

The same thought is expressed in *Smith v. Texas,* 233 U. S. 630, 34 S. Ct. 681, at page 682:

> "Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of

those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

In *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, the court said: "The privilege of contracting is both a liberty and a property right." As it is a property right, corporations are protected under this constitutional clause. (See 11 Am. Jur. "Constitutional Law," Sec. 334, page 1145, and Note 13, and cases there cited, including *Pierce v. Society of Sisters*, 268 U. S. 510, 45 S. Ct. 571.) From this it follows that, as the right to barter for one's services and to fix the price therefor is a property right, a statute such as this which requires the performance of the services of a tax collector for the arbitrary sum of 3% of the amount which should, but may not, be collected *(as reimbursement for expenses, but not compensation for services)*; likewise contravenes these constitutional provisions; and the conscripting of one's services as a tax collector, with only a fixed allowance therefor, is the taking of private property for a public use without just compensation, because no provision or attempt is made to determine the value to the conscripted agent of his services performed as such collector. (See 11 Am. Jur., "Constitutional Law," Sec. 335, page 1147.)

As a corollary to the foregoing, it has been said that "the liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed." (11 Am. Jur., page 1153.) Under the Service Tax Act, as construed in the Colorado Supreme Court's opinion, however, the performer must

accept the employment of a tax collector and assume the attendant liabilities, both civil *and criminal.*

It cannot now be questioned that the privilege of contracting is both a liberty and a property right, protected by the federal Constitution; that every person has the right freely to deal, and to refuse to deal, with whomsoever he may choose; and no legislature of any state may, without his consent, make a contract (in this case, of employment as a tax collector) for him. (For many cases see citations to 11 Am. Jur., Sec. 339, pages 1153 to 1157.)

In addition to the protection afforded to all persons and corporations by the foregoing constitutional provisions and principles, national banks are protected against being conscripted as tax collectors, by the Acts of Congress, which are the "law of the land" and were adopted pursuant to the governmental powers conferred upon the Congress by Article I, Section 8, of the United States Constitution.

The validity of the enforcement provisions of the Service Tax Act does not seem to have been considered in the Colorado Court's opinion, except in this one sentence (104 Colo. 320, 91 Pac. (2d) 473): "While the bank is liable to the state for the tax, the act itself is so worded that the bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act." This sentence considers only the "*tax burden,*" and not the other burdens and duties of the conscripted tax collector.

We are not unmindful of the severability clause of the act; that the validity or invalidity of the other burdens and duties (except procuring a license) is left open by the opinion, just as the validity of Section 11 relating to a first and prior lien is left open; and that each and all of the other enforcement provisions may be successively deleted, as unconstitutional in cases which arise under them. Such an answer begs the question. The General Assembly so

worded the act that each and all of these other provisions might stand, and, therefore, in considering who is the taxpayer, the state court should have also considered what effect its decision would have on these other provisions, and it should have harmonized its opinion with them, if possible, to the end that the entire act may stand as against performers of all services not exempted by the act.

We assume, for the purpose of this brief, that if the state has the right to regulate and license, or to tax, a particular business, and so to exercise its police power or its taxing power as to that particular business, as an incident to the exercise of either of those powers, it may require the one conducting that particular business to charge a tax to the user of the business, to collect the tax and to pay it to the state. As indicated in the New Hampshire case, supra, the duty, in such instances to collect and pay, is a term or condition of the license.

This principle, however, does not justify the conscription of a national bank as a tax collector. The Colorado Supreme Court's opinion specifically, and properly, holds (104 Colo. 315, 91 Pac. (2d) 471) that the state cannot license a national bank, and (104 Colo. 313-314, 91 Pac. (2d) 471) and that the state cannot tax it, except as provided in R. S., Section 5219, as amended. The attempt, therefore, to conscript a national bank as a tax collector is not as an incident to the exercise of the state's police power or taxing power over national banks.

Under the laws of many states, state or county tax collectors are employed, in some places at fixed salaries and in others for compensation based upon percentages of collections. We pose the question: May a national bank, under its charter powers prescribed by the federal law, accept the employment as such a tax collector? The answer is, of course, that it would be ultra vires. The next question then is: May a national bank be forced by a state into an employment which it could not accept voluntarily? And the answer must be that it may not.

The powers of national banks, other than the power to represent estates, trusts, etc., which is in a separate category, are defined and limited by R. S., Sec. 5136, Subd. 7 (U. S. C. A., Title 12, Sec. 24), quoted above.

It has many times been held that no state may add to, or deduct from these powers; that by this and other sections of the National Banking Act, Congress has provided a comprehensive and somewhat detailed system for the measure of authority, management, supervision and conduct of the business of national banks; and that any law of any state, even though adopted under a state's police power, within this field governed by Congress, is void unless *expressly* permitted by some other Act of Congress. *Meyers v. Exchange National Bank*, 96 Wash. 244, 164 Pac. 951, at 952 to 955, cites and quotes many United States Supreme Court cases and closes the subject by saying:

> "It is plain that under the federal decisions which we have reviewed the state cannot impose any liability upon a national bank by adding any powers to those expressly granted or fairly implied in the act authorizing its creation."

The Colorado Supreme Court did not consider the additional liability which it imposes upon national banks by adding to their powers that of acting as a tax collection agent, and in truth forcing it upon them. This is a question entirely distinct and apart from the question of immunity from taxation, either expressed or implied. It is the immunity granted by the United States Constitution and Acts of Congress from interference with the powers and liabilities which Congress has fixed for national banks.

It has been held and said, in many cases, that the symmetrical and complete scheme, with checks and balances, provided by Congress for national banks is designed so that a national bank "can assume no liability without acquiring assets to offset it." (7 Michie, Banks and Banking, page 217.) The said opinion in this case, however, imposes liability upon national banks for the

service tax on their depository services, even though they have not or cannot collect it, as agents, from their customers, and so have no asset to offset this newly state created liability.

Consider this—that a national bank, under its charter, may not become liable on an engagement to pay a debt of a third person when such person has no funds on deposit, out of which it might respond. (Bowen v. National Bank, 94 Fed. 925.) Yet, if the user of the bank's services is the taxpayer, such prohibited liability is cast upon the bank by the act. Consider this also—such liabilities would not appear in the reports to the Comptroller, he would have no knowledge of them, and thus would be nullified the safeguards of the Banking Act relating to examinations and the reports to be filed with the Comptroller, "exhibiting, in detail, a national bank's resources and liabilities." (R. S., 5211, U. S. C. A., Title 12, Sec. 161.)

See, also, upon this subject, *Farmers, etc. Nat'l Bk. v. Dearing, Davis v. Elmira Savings Bk., Easton v. Iowa,* and the *Pittsburg v. Nat'l Bk.* (all supra).

A case in this court on two aspects of this brief is *Clement National Bank v. Vermont,* 231 U. S. 120, 34 Sup. Ct. 31. In that case this court recognized, followed, and applied the principles upon which we stand. The state statute imposed a direct and primary tax liability on the owners of savings accounts in national banks in Vermont, *requiring the depositors* of the said accounts to make returns as to the said accounts and *to pay the tax thereon.* It further provided that a national bank might, at its option, *without being required to do so,* stipulate to return such accounts, and as agents for its depositors to pay the tax, and deduct the amount thereof from interest to be paid on such deposits. This court held the statute valid as to national banks, *because national banks were not made the taxpayers by the statute,* inasmuch as no direct or primary liability was imposed on them, *by the statute.* Note the following pertinent excerpts from the opinion:

"But it is apparent that, whatever objections may lie, the tax complained of is not laid upon the national bank itself, its property or franchise. *It is imposed upon the depositors; they alone are required to pay it.* If they fail to make returns, as provided by the statute, they are subject to penalty; *and both tax and penalty are recoverable by suit against them in the name of the state.* If they escape the tax, it is because of the Bank's stipulation. *If the Bank becomes liable, it is by virtue of its agreement, and not otherwise.* * * * *The statute lays the tax upon the depositor, in so many words.*" (In Colorado if the performer of services fails to make returns under the service tax act, the performer is subject to penalty; and both tax and penalty are recoverable from the performer, but are not recoverable by the state from the user.)

* * * * *

"National banks did not pay, and could not be compelled to pay, a franchise tax, or other tax upon their deposits.

* * * * *

"As to national banks, the state does not follow the course taken with the state institutions, and lay a tax upon the bank.

* * * * *

"The federal statutes relative to national banks constitute the measure of the authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. (Citing many cases.) These incidental powers are such 'as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently.'"

IV.

UNLAWFUL DISCRIMINATION.

We deem it unnecessary to cite cases holding that a state taxing statute is unconstitutional which, either in its wording or in its application, is not uniform.

All of the rulings, and documents, quoted in this portion of our brief were considered by the Colorado Supreme Court, were quoted in the briefs submitted to it, and it took judicial cognizance of them. We deem it proper to give this court the same full knowledge of the situation as was possessed by the Colorado Supreme Court.

We have heretofore pointed out that the Treasurer's ruling, causing this controversy and litigation, that a national bank's safe-deposit service is "outside" its banking business, is not founded on anything in any law, statutory or decisional.

It did not conform to an official opinion given by the State's Attorney General on May 25, 1937 evidenced by his letter to certain national bank attorneys reading as follows:

"THE STATE OF COLORADO
Department of Law
Denver

May 25, 1937.

Lewis and Grant,
Attorneys at Law,
First National Bank Bldg.
Denver, Colo.

Gentlemen:

In reply to your letter of May 22, 1937, inquiring whether national banks incorporated under the laws of the United States of America and carrying on business in the State of Colorado are subject to the provisions of the Public Revenue Service Tax

Act of 1937, it is the opinion of this office that this act does not apply to national banks inasmuch as these banks are agencies of the United States government.

Yours very truly,

Byron G. Rogers,
Attorney General,
By Luke J. Kavanaugh,
Deputy Attorney General."

Although the Treasurer has proceeded in an attempt to tax one service performed by a national bank, he has officially ruled that services of other federal agencies are exempt. This is evidenced by his Article No. 72 of Bulletin numbered 3, issued July 26, 1937, reading as follows:

"72. SAVINGS, BUILDING & LOAN ASSOCIATIONS—Federal Savings, Building and Loan Associations and all State Savings, Building and Loan Associations which are members of the Federal Home Loan Bank, are exempt from state taxation and are therefore not subject to the Colorado State Service Tax, and *need neither collect nor pay such taxes.*" (Italics are ours.)

Notwithstanding the foregoing, on December 30, 1937, the plaintiff Treasurer made a written demand on all of the Denver Clearing House Banks to collect and pay the service tax on their charges for *fiduciary* services, as well as *depository* services. Each of the national banks belonging to the said association, including the appellant bank, then commenced against the Treasurer a declaratory judgment suit in the District Court of the United States for the District of Colorado, under the federal declaratory judgments law, because the amount of the tax then unpaid on fiduciary services, together with the tax on depository services, would exceed the jurisdictional sum of $3,000. Thereupon, the State Treasurer again ruled and conceded that banking services of these particular agencies

and instrumentalities are exempt, that fiduciary services are banking services, held, with the approval of the Attorney General, that his said demand was erroneous, wrote to each of the said banks a letter to that effect, and filed counterparts thereof with the Federal District Court to show that there was no controversy with respect to fiduciary services, and the jurisdictional amount of $3,000 was lacking. His said letter (a counterpart of which is quoted in his pleading in the Federal District Court and filed therein) to the appellant bank is as follows:

"Homer F. Bedford
State Treasurer
Ed Rich
Deputy Treasurer

STATE OF COLORADO
Division of Finance
Department of Finance and Taxation
Office of State Treasurer
State Capitol—Denver
April 19, 1938

Colorado National Bank,
Denver, Colorado.

The contents of a letter dated December 30th, 1937, signed by L. F. Crawford, Claims Department, addressed to you pertaining to the Colorado Service Tax Law, has been called to my attention. In that letter, you were notified to file with this office returns showing the amount of service taxes due the state, and remit the tax so due. Such letter contained a statement that the taxable services performed by banks which were subject to tax, included '*all services and activities rendered and performed in a fiduciary capacity,* and in the rental, maintenance and operation of safety deposit vaults, depositories, boxes and containers.' Such statement was erroneous.

This letter is to notify you of that error and make a correct statement of the demand made upon you.

Please be advised that it was the ruling of the State Treasurer on that date, and is still the ruling of the State Treasurer, that the only services known to be performed by banks which are subject to the Service Tax Act, are those performed in operating depositories or safety deposit boxes. The rulings of this office pertaining to such question remain the same as they were published in the booklet last October, found on page 53 thereof, being Special Rules numbered 10 and 11, reading as follows:

(The letter then quotes Secs. 10 and 11, which are quoted at page 2 of the record herein.)

Very truly yours,

Homer F. Bedford,
State Treasurer."

We have never been able to account for the varying positions officially taken by the Treasurer, without any legal foundation therefor whatever. Such applications of the law are certainly inconsistent, and, in our opinion, discriminatory. Discrimination exists also as between "depositories" in competition with each other.

As held in *Bank v. Portland* and other cases cited above, the relation between a bank and a customer of its safe-deposit vault service, is that of bailor-bailee. This is also the identical relation between other storagemen or warehousemen and their customers. In *Bedford, Treasurer, v. Johnson*, 102 Colo. 203, 78 Pac. (2d) 373, the Colorado Supreme Court held that the services of storagemen and warehousemen are not taxed. There is no difference between the services performed by a warehouseman or storageman and by a bank in their accepting, respectively, for deposit and storage in their vaults and rooms, of chests

or packages containing valuables, and of valuables generally. If such services are taxed at all, they must all be taxed; otherwise, if one should store such property in a bank, the service would be taxed, whereas if stored with a warehouseman, it would not. Such discrimination would permit destruction of a bank's depository business, and is prohibited by the Amendment to the United States Constitution condemning discriminatory taxation.

CONCLUSION.

We have presented, as we believe, valid reasons which lead to the conclusion that "the State of Colorado is prohibited from taxing under the Constitution or laws of the United States" the safe deposit services of a national bank. This, after all, is a federal question. The first judgment and decree of the Denver District Court, so deciding and so applying the exemption provision of Sec. 7 (a) of the act, was right and proper.

Beginning with the philosophy of McCulloch v. Maryland, and ever since the creation of national banks and the first adoption of what is now R. S., Sec. 5219, as amended, it has been the law of the land that states may not tax national banks, except as permitted by Congress, and that by that section Congress has permitted the forms and methods of taxation therein specified, and prohibited all others. Both Congress and the states have so treated the section and the decisions thereon. When, in the opinion of Congress, it became desirable, to keep abreast of the times, as income taxation became the vogue, Congress amended the section to permit state taxation of national banks' income and income from national bank shares. So too, it rests with Congress to say when and in what manner a state may otherwise tax any part of the business, safe-deposit or what not, of national banks.

To depart from this rule and to permit states, as their own legislatures or their own courts may deem proper, to

tax national banks and any part of the business of national banks, *unless* they assume and perform other liabilities and obligations which the states choose to impose, will encroach upon and may destroy the power of Congress, supposed to be supreme in this field. The facts attendant upon this litigation are an example. At first the state authorities conceded that the state could not tax any of the national banks' services. Then they changed their minds and decided to tax safe-deposit services. Shortly thereafter they made an attempt, which they quickly abandoned, when opposed, to tax the national banks' trust services. Logic, however, demands that they either may, or may not, tax all national banks' Congressionally authorized services. The district court believed, and so ruled in the first judgment and decree, that the prohibition extended to all services, and did not admit of any exception.

To us, the effort to distinguish between safe-deposit services is extremely strained and without any foundation in law. Strained, also, is the attempt to bottom this case upon decisions where only *implied immunity* was involved. Cases of implied immunity and cases of Congressional grants of immunity are not comparable. The reasons influencing decisions in the two classes of cases are entirely different. Because any particular court or judge might believe that immunity from taxation should not be implied except under circumstances very materially affecting governmental functions, is no reason that the same court or judge should not abide by and follow an act of Congress granting immunity even though governmental functions may be but slightly affected. *Pittman, Clerk, v. H. O. L. C.*, decided at this court term, is an example of our thought upon this subject.

We do not ask that this court usurp from the state court the decision of a local law or purely state question. What may be the United States constitutional or statutory prohibitions of state taxation, must ultimately be determined by this court. If the exemption of Sec. 7 (a) of the

act applies, and we believe it does, then the Colorado state courts are free to construe the Service Tax Act however they may deem proper. We feel that the judgment of the Colorado Supreme Court should be reversed and the cause remanded with directions for the reinstatement of the first declaratory judgment and decree, in this litigation, entered by the district court of the City and County of Denver, Colorado.

WALTER W. BLOOD,
FRANK N. BANCROFT,
Attorneys for Appellant.

APPENDIX.

REVISED STATUTES, SECTION 5219, AS AMENDED.

(U. S. C. A., Title 12, Sec. 548.)

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided*, That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing state may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon mercantile, manufacturing, and business corporations doing business within its limits: *Pro-*

vided, however, That a state which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from National banking associations located without the state on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any state, shall be taxed by the taxing district or by the state where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Sec. 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S., Sec. 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.)"

THE PUBLIC REVENUE SERVICE TAX ACT OF 1937.

(Session Laws of Colorado, 1939, Chapter 158.)

"Be It Enacted by the General Assembly of the State of Colorado:

Chapter 240, Session Laws of Colorado, 1937, is hereby amended and as so amended, it is re-enacted to read as follows:

Section 1. This Act shall be known, and may be cited, as The Public Revenue Service Tax Act of 1937. This Act shall be effective for two years, and shall terminate at midnight on the 30th day of June, A. D. 1941.

Section 2. *Definitions.* (a) The term 'person' includes any individual, firm, co-partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit in the plural as well as the singular number.

(b) The term 'state treasurer' or 'treasurer' shall mean the Treasurer of the State of Colorado.

(c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter designated and defined, when said act or service is rendered, furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.

(d) The term 'business' shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the State under the terms of this Act.

(f) The term 'tax' means either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax, or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

(g) The term 'value of services' means the price to the user, exclusive of any direct tax imposed by the federal government or by this Act.

(h) The term 'gross taxable services' shall mean the total amount received in money, credits, property or other consideration valued in money from services rendered or performed within this State as herein defined, and embraced within the provisions of this Act; *provided* that the taxpayer may take credit in his report of gross taxable services for an amount equal to the value of services rendered or performed when the full value of services thereof is refunded either in cash or by credit and; *provided further,* that on all services rendered or performed, valued in money, when such services are made under conditional contract, or under other contract or agreement where the payment of the principal sum thereunder be extended over a period longer than sixty (60) days from the date of contract or agreement thereof, only such portion of the value of services thereof may be accounted for the purpose of imposition of the tax imposed by this Act as has actually been received in cash by the taxpayer during the period for which the tax imposed by this Act is due and payable; and *provided further,* that taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amounts so collected.

(i) The words 'includes' and 'including,' when used in a definition or classification contained in this Act, shall not be deemed to exclude other things otherwise within the meaning of the term defined, or otherwise within the classification specified.

Section 3. Services rendered or performed as herein defined to a person engaged in rendering services taxable under this Act or in selling tangible personal property subject to retail sales tax, provided that the cost of such services, directly or indirectly, enter into and become a part of the charges to the ultimate user or purchaser, shall be exempt; provided that, should a dispute arise between the user and the person rendering or performing services as to whether or not any such service rendered is exempt from taxation hereunder, nevertheless, the person performing said services shall collect and the user shall pay such tax, and the person performing said service shall thereupon issue to the user a receipt, or certificate, on forms prescribed by the treasurer, showing the names of the person performing said services and the user, the item purchased, the date, price, amount of tax paid, and a brief statement of the claim of exemption. The person performing said services thereafter may apply to the state treasurer for a refund of such taxes, and it shall then be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided. It shall be a misdemeanor, punishable as provided in this act, for any person performing said services to fail to collect, or user to fail to pay the tax levied by this act, and on services rendered or performed on which exemption is disputed.

Section 4. (a) It shall be unlawful for any person to engage in the business of rendering or performing services as the same is defined in this act, after the effective date of this act without first having obtained a license therefor, which license shall be granted and issued

by the state treasurer and shall be in force and effect until the thirty-first day of December of the year in which it is issued, unless sooner revoked; except a person who has obtained and who holds a license issued under the provisions of any statute requiring the issuance or securing of a license and a person engaged in the business of rendering or performing services of a professional, technical or scientific nature.

(b) Such license shall be granted or renewed only upon application stating the name and address of the person desiring such a license, the name of such business and the location, including the street number of such business, and such other facts as the state treasurer may require. It shall be the duty of each such licensee on or before January first of each year, to obtain a renewal thereof if the licensee remain in business or liable to account for the tax herein provided, but nothing herein contained shall be construed to empower the state treasurer to refuse such renewal, except revocation for cause of licensee's prior license. For each license issued hereunder a fee of one dollar ($1.00) shall be paid, which fee shall accompany the application together with an additional fifty cents (50c) for filing fee. A further fee of one dollar ($1.00) shall be paid for each year or fraction thereof for which said license is renewed, together with an additional fee of fifty cents (50c) for filing fee; provided that only one-half of said one dollar ($1.00) fee shall be charged on licenses issued after July first of any year.

(c) In case business is transacted at two or more separate places by one person, a separate license for each place of business shall be required.

(d) Each license shall be numbered and shall show the name, residence and place and character of business of the licensee and shall be posted in a conspicuous place in the place of business for which it is issued. No license shall be transferable.

(e) The state treasurer may, on a reasonable notice and after full hearing, revoke the license of any person found by the treasurer to have violated any provision of this act. This power to revoke licenses shall extend only to licenses issued by the state treasurer. Any person engaged in the business of rendering or performing services as the same is defined in this act, without having secured a license therefor as herein provided, shall be guilty of a misdemeanor, and shall be punished accordingly.

(f) Any finding and order of the treasurer revoking the license of any person shall be subject to review by the district court of the district where the business of the licensee is conducted, upon application of the aggrieved party. The procedure for review shall be, as nearly as possible, the same as now provided for the review of findings by writ of certiorari.

(g) No license shall be required for any person engaged exclusively in the business of rendering or performing services which are exempt from taxation under this act.

Section 5. From and after the effective date of this act there is hereby levied and imposed upon the services specified in this act and measured by the amount paid therefor and there shall be collected and paid:

(a) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in the business of *conduction* any amusement enterprise, including theatres, picture shows, carnivals, circuses, amusement parks, menageries, dog shows, horse shows, fairs, races, games, dances, dance halls, pool or billiard halls, or any business charging admission for any exhibition, amusement, edification or instruction; *provided* that religious institutions, schools, and colleges shall be exempt from the provisions of this special section.

(b) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in the business of contracting for the con-

struction, reconstruction, repair, or improvement, in whole or in part, of any buildings, dwellings, edifices, or any other similar work or performance in which a person covenants or bargains or agrees to perform said work for a stipulated sum, or at cost plus a percentage or additional sum.

(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: barber shops; beauty shops; beauty parlors; cleaning, dyeing, pressing, alteration and repair shops; *launderies*, except hand laundries in a private home; photographic studios; rug cleaning and repair shops; shoe repair shops; shoe shining parlors; hat cleaning; adjustment and credit bureaus, collection agencies and credit reporting services; dental laboratories; duplicating, addressing, mailing, and mailing list service; employment agencies; linen, coat, apron and overall supply service; sign painting shops; window cleaning service; automobile general repair garages; automobile paint shops; automobile radiator shops; automobile rental service; automobile rent storage garages; automobile top and body repair shops; battery and ignition repair shops; tire repair shops; parking lots; blacksmith shops; electrical appliance repair shops; harness and leather goods repair shops; locksmith and gunsmith shops; radio repair shops, upholstering and furniture repair shops; watch, clock and jewelry repair shops; cabinet making and woodworking shops; grist mills; hemstitching, embroidering and buttonholing shops; machine shops; mattress renovating and repair shops; commercial printing shops, commercial lithographing plants, commercial engraving plants, commercial linotyping plants, commercial artists; saw mills and planing mills, tinsmith shops; welding shops; advertising service agencies; banks, finance companies; trust companies and depositories; except as to interest on money loaned, stock or commission brokers or agents; and any other business of a similar

nature in which services (not professional) are performed on a price or fee basis; provided, however, that there shall be excepted and exempt from taxation under this act services rendered or performed by any person engaging or continuing in any of the following businesses: hospitals, sanitaria, homes for convalescents and cemeteries.

(d) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in the business of operating a hotel, an apartment hotel, cottage camp, a lodging house or other similar establishment operated for the accomodation of the general public for charge and having facilities for more than ten (10) occupants, except services for meals and cover charges, if any, furnished at any such establishment.

(e) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging in business of a professional, technical or scientific nature, where services are rendered or performed on a fee basis, or for consideration in the nature of a retainer, including but not limited by: abstractors; accountants; architects; barbers; cosmotologists; engineers, pharmacists; real estate brokers; shorthand reporters; attorneys-at-law; lobbyists; auctioneers; and any other business of a professional, technical or scientific nature in which services are rendered or performed on a price or fee basis or for a consideration in the nature of a retainer, except the services of a minister, priest or rabbi or of any service of a religious nature, and except the services of chiropractors, osteopaths; physicians; surgeons; dentists; embalmers; nurses; optometrists; undertakers; chiropodists; hospitals; cemeteries; or state licensed veterinarians.

Section 6. (a) Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon his total taxable services rendered or performed, and shall, before the fifteenth day of each

month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, less three (3) per cent thereof to cover the expense of the person rendering or performing services, in the collection and remittance of said tax. Such return, verified by oath or affirmation of the taxpayer or his duly authorized agent, shall contain such information and be made in such manner and upon such forms as the state treasurer may prescribe and the state treasurer may extend the time for making returns and paying the taxes due under such reasonable rules and regulations as he may prescribe, but no such extension shall be for a greater period than is provided for in subdivision (e) of this section. The burden of proving that any person is exempt from collecting the tax on any services rendered or performed and paying same to the state treasurer, or from making such returns, shall be on the person rendering or performing such services under such reasonable requirements of proof as the state treasurer may prescribe.

(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

(c) To provide uniform methods of adding the tax, or the average equivalent thereof, to the value of service, it shall be the duty of the state treasurer to formulate and promulgate after hearing appropriate rules and regulations to effectuate the purpose of this section.

(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the

public or to any user, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by him or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(e) If the accounting methods regularly employed by the person rendering or performing service in the transaction of his business, or other conditions, are such that reports of services rendered or performed made on a calendar month basis will impose unnecessary hardship, the state treasurer may, upon written request of the person rendering or performing services, accept reports at such intervals as will in his opinion better suit the convenience of the taxpayer and will not jeopardize the collection of the tax. Provided, however, the state treasurer may by rule permit taxpayers whose monthly tax collected is less than twenty dollars ($20.00) to make returns and pay taxes at intervals not greater than every three (3) months.

(f) For the purpose of more efficiently securing the payment, collection and accounting of the taxes provided for under this act, the state treasurer in his discretion, by proper rules and regulations, may provide for the issuance of tokens or other appropriate devices to facilitate collections.

(g) A person doing business in two or more places or locations, taxable hereunder, may file one return covering all such business activities engaged within this state.

(h) If any person shall, during any reporting period, collect as a tax an amount in excess of two (2) per cent of his total services rendered or performed, he shall remit to the state treasurer the full net amount of the tax herein imposed and also such excess; and if any person under the pretense of representation of collecting the tax imposed by this act shall collect during any reporting period an amount in excess of two (2) per cent of his total

services rendered or performed the retention of such excess or any part thereof, or the intentional failure to remit punctually to the state treasurer, the full amount required to be remitted by the provisions of this chapter, is declared to be unlawful and shall constitute a misdemeanor.

Section 7. (a) All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States Government, to the State of Colorado, its department and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to or by religious, charitable, educational and eleemosynary institutions, in the conduct of their regular religious, charitable, educational or eleemosynary functions and all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this act; provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to whether or not any services rendered or performed are exempt from taxation hereunder, nevertheless the person rendering or performing services shall collect and the user shall pay such tax, and the person rendering or performing services shall thereupon issue to the user a receipt or certificate, on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; provided further, that a refund shall be made, or a credit allowed, for the tax so paid under dis-

pute by any user who has an exemption as in this act provided. Such refund shall be made by the state treasurer after compliance with the following conditions precedent:

(b) Applications for refund must be made within sixty (60) days after the rendering or performance of services whereon an exemption is claimed and must be supported by the affidavit of the user accompanied by the original paid invoice, receipt and certificate issued by the person rendering or performing services, and be made upon such forms as shall be prescribed and furnished by the state treasurer, which forms shall contain such information as said state treasurer shall prescribe. Upon receipt of such application the treasurer shall examine same with all due speed and shall give notice to the applicant by order in writing of his decision thereon. Aggrieved applicants may, within ten (10) days after such decision is mailed to them, petition the treasurer for a hearing on the claim in the manner provided in this act. The right of any person to a refund under this article shall not be assignable and such application for refund must be made by the same person who paid the tax thereon as shown in the invoice, receipt or certificate.

(c) Any applicant for refund under the provisions of this section, or any other person, who shall make any false statement in connection with an application for a refund of any taxes shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of *no* more than five hundred dollars ($500.00) or by imprisonment in the county jail of not more than ninety (90) days, or by both such fine and imprisonment.

(d) If any person be convicted under the provisions of this section, such convictions shall be 'prima facie' evidence that all refunds received by such person during the current year were obtained unlawfully and the state treasurer is hereby empowered and directed to bring appropriate action for recovery of such refunds, a brief sum-

mary statement of the above mentioned penalties shall be printed on each form application for refund.

(e) The burden of proving that services rendered and performed, on which tax refunds are claimed, are exempt from taxation under this act, shall be on the one making such claim under such reasonable requirements of proof as the state treasurer may prescribe. Should the applicant for refund be aggrieved at the final decision of the treasurer, he may proceed to have same reviewed by the courts in the manner provided for review of other decisions of the treasurer as provided in this act; except that such review shall be in the district court of the City and County of Denver.

Section 8. (a) Except in accordance with judicial order or as otherwise herein provided, the State Treasurer, his agents, clerks, and employees shall not divulge any information gained by it from any return filed under the provisions of this act. The officials charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the State Treasurer in an action or proceeding under the provisions of this act to which it is a party, or on behalf of any party to any action or proceeding under the provisions of this act when the report of facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein contained shall be construed to prohibit the delivery to a person or his duly authorized representative of a copy of any return or report filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the At-

torney General or other legal representative of the state of the report or return of any person who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding is contemplated or has been instituted under this act. Reports and returns shall be preserved for three (3) years and thereafter until the State Treasurer orders them destroyed.

(b) Any state officer or employee or any member, officer, or employee of the State Treasurer, who shall divulge any such information in any manner, except in accordance with proper judicial order, or as otherwise provided by law, shall be guilty of a misdemeanor.

Section 9. (a) As soon as practicable after the return is filed, the State Treasurer shall examine it; if it then appears that the correct amount of tax to be remitted is greater or less than that shown in the return to be due, the tax shall be recomputed. If the amount exceeds that which is due, the excess shall be refunded or credited against any subsequent remittance from the same persons. If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one-half of one per cent per month from the time the return was due, shall be paid by the person rendering or performing services within ten (10) days after written notice and demand to him is received from the State Treasurer.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten per cent (10%) of the total amount of the deficiency and interest in such case shall be collected at the rate of one (1) per cent per month on the amount of such deficiency from the time the return was due, from the person required to file the return, which interest and addition shall become due and payable ten (10) days after written notice and demand to him by the Treasurer. If

any part of the deficiency is due to fraud with the intent to evade the tax, then there shall be added fifty per cent (50%) of the total amount of the deficiency and in such case, the whole amount of the tax unpaid, including the additions, shall become due and payable ten (10) days after the written notice and demand by the State Treasurer and an additional one per cent (1%) per month on said amount shall be added from the date the return was due until paid.

(c) For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person, the State Treasurer or his duly authorized deputies, may hold investigations and hearings concerning any matters covered by this act and may examine any relevant books, papers, records or memoranda of any such person and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of such services rendered, and may take testimony and require proof for its information. The Treasurer and his authorized deputies shall have power to administer oath to such persons.

(d) All subpoenas issued under the terms of this act may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the district courts of this state; such fees to be paid when the witness is excused from further attendance. When the witness is subpoenaed at the instance of the State Treasurer, such fees shall be paid in the same manner as other expenses of the State Treasurer, and when the witness is subpoenaed at the instance of any party to any such proceeding, the State Treasurer may require that the cost of service of the subpoena and the fee of the witness be borne by the party at whose instance the witness is summoned. In such case, the State Treasurer, in his discretion, may require a deposit to cover the cost of such service and witness fees.

A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court of record.

(e) Any district court of this state, or any judge thereof, either in term time or vacation, upon the application of the State Treasurer, may compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the State Treasurer or any member or officer thereof, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court.

(f) The State Treasurer or any party in an investigation or hearing before the State Treasurer, may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in courts of this state, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda.

Section 10. It shall be the duty of every person engaging or continuing in business as designated and defined in this act in this state, to keep and preserve suitable records for a period of three years of all services rendered by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is liable under the provisions of this act.

Section 11. (a) The tax imposed by this act shall be a first and prior lien upon the stock of goods and business fixtures of any person rendering or performing services or other person liable for the payment of taxes under this act and shall take precedence over other liens or claims of whatsoever kind or nature, except as to pre-existing liens on property not used in performing services as provided herein; and any person rendering or performing services who shall sell out his business or stock of goods, or shall quit business, shall be required to make out the return as provided in this act, within ten (10) days

after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the State Treasurer showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided and the taxes shall be due and unpaid after the ten (10) day period allowed, he, as well as the vendor, shall be personally liable for the payment of the taxes unpaid by the former owner. Likewise, anyone who takes any stock of goods or business fixtures of any person rendering or performing services, shall take same subject to the lien for any delinquent taxes for rendering or performing services owned by such person and shall be liable for the same up to the value of the property taken.

(b) Whenever the business or property of any taxpayer subject to this act shall be placed in receivership, bankruptcy or assignment for the benefit of creditors, or seized under distraint for property taxes, all taxes, penalties and interest imposed by this act shall be a prior and preferred claim against all the property of said taxpayer, except as to pre-existing liens on property not used in performing services as provided herein, and no sheriff, receiver, assignee, or other officer shall sell such property of any person subject to this act under process or order of any court, without first ascertaining from the State Treasurer the amount of any taxes due and payable under this act, and if there be any such taxes due, owing or unpaid, it shall be the duty of such officer to first pay the amount of said taxes out of the proceeds of said sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind or nature, except the costs of the proceedings.

Section 12. (a) All sums of money paid by the user to the person rendering or performing services as taxes imposed by this chapter shall be and remain public money, the property of the State of Colorado, in the hands of such person rendering or performing services and he shall hold the same in trust for the sole use and benefit of the State of Colorado until paid to the State Treasurer, as herein provided, and for failure to so pay to the State Treasurer, such person rendering or performing services shall be punished as provided by law.

(b) If a person neglects, or refuses to make a return in payment of the tax as required by this act, the State Treasurer shall make an estimate, based upon such information as may be available, of the amount of taxes due for the period or periods for which the taxpayer is delinquent; and upon the basis of such estimated amount, compute and assess in addition thereto, a penalty equal to ten per cent (10%) thereof, together with interest in such delinquent taxes at the rate of one per cent (1%) per month from the date when due. Promptly thereafter, the State Treasurer shall give to the delinquent taxpayer written notice of such estimated taxes, penalty and interest, which notice must be served personally or by registered mail. Such estimate shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the State Treasurer ten (10) days from the date of service of the notice or the date of mailing by registered mail; *provided, however,* that within said ten (10) day period such delinquent taxpayer may petition the State Treasurer for a revision or modification of such assessment, and shall, within such ten (10) day period, furnish the State Treasurer the facts and correct figures showing the correct amount of such taxes. Such petition shall be in writing, and the facts and figures submitted shall be submitted either in writing or orally, and shall be given under oath of said taxpayer. Thereupon the State Treasurer shall modify such assessment in accordance with the facts sub-

mitted, which fact he deems correct. Such assessment shall be considered the final order of the State Treasurer, and may be reviewed by writ of certiorari as provided in this act, provided that the taxpayer give written notice to the State Treasurer of such intention within five (5) days after receipt of the final order of assessment.

(c) If any taxes, penalty or interest imposed by this act and shown due by returns filed by the taxpayer or as shown by assessments duly made as provided herein, are not paid within five (5) days after the same are due, the State Treasurer may issue a notice, setting forth the name of the taxpayer, the amount of the tax, penalties and interest, the date of the accrual thereof, and that the State of Colorado claims a first and prior lien therefor on the real and tangible personal property of the taxpayer except as to preexisting liens on property not used in performing services as provided herein. Said notice shall be on forms prepared by the State Treasurer, and shall be verified by him or by his duly qualified deputy, or any duly qualified agent of the State Treasurer, whose duties are the collection of such tax, and may be filed in the office of the clerk and recorder of any county in the state in which the taxpayer owns real or tangible personal property, and the filing of such notice shall create such lien on such property in that county and constitute notice thereof. After said notice has been filed, or concurrently therewith, or at any time when taxes due are unpaid, whether such notice be filed or not, State Treasurer may issue a warrant under the official seal of the Treasurer of the State of Colorado directed to any duly authorized revenue collector, or to the sheriff of any county of the state, commanding him to levy upon, seize and sell sufficient of the real and personal property of the tax debtor found within his county for the payment of the amount due, together with interest, penalties and costs, as now or hereafter may be provided by law.

(d) Such revenue collector or the sheriff shall forthwith levy upon sufficient of the property of the taxpayer and said property so levied upon shall be sold in all respects with like effect and in the same manner as is prescribed by law in respect to executions against property upon judgment of a court of record, and the remedies of garnishments shall apply. The sheriff shall be entitled to such fees in executing such warrant, as are now allowed by law for similar services.

(e) Any lien for taxes as shown on the records of the county clerks and recorders as herein provided, shall, upon payment of all taxes, penalties and interest covered thereby, be released by the State Treasurer in the same manner as mortgages and judgments are released.

(f) It shall be the duty of any county clerk to whom such notices are sent, to file and record the same without cost or charge.

(g) The State Treasurer may also treat any such taxes, penalties or interest due and unpaid as a debt due the state from the vendor. In case of failure to pay the tax, any portion thereof, or any penalty or interest thereon when due, the State Treasurer may recover at law the amount of such taxes, penalties and interest in such justice, county or district court of the county wherein the taxpayer resides or has his principal place of business having jurisdiction of the amounts sought to be collected. The return of the taxpayer or the assessment made by the State Treasurer, as herein provided, shall be 'prima facie' proof of the amount due. Such actions may be actions in attachment, and writs of attachment may be issued to the constable or sheriff as the case may be and in any such proceeding no bond shall be required of the State Treasurer, nor shall any constable or sheriff require of the State Treasurer an indemnifying bond for executing the writ of attachment, or writ of execution upon any judgment entered in such proceedings; and the State Treasurer may

prosecute appeals or writs of error in such cases without the necessity of providing bond therefor. It shall be the duty of the Attorney General or any district attorney when requested by the State Treasurer, to commence action for the recovery of taxes due under this act, and this remedy shall be in addition to all other existing remedies or remedies provided in this act, and the provisions of this section and Section 11 shall apply to taxes now due, as well as those becoming due hereafter. The State Treasurer may, for good cause shown, waive any penalty *impared* by this act. A penalty shall be deemed any charge in excess of six (6) per cent interest per annum.

Section 13. If any person feels aggrieved by the assessment made upon him by the State Treasurer, he may apply to the State Treasurer by petition in writing within ten (10) days after the notice is mailed to him for a hearing and a correction of the amount of the tax so assessed, in which petition he shall set forth the reasons why such hearing should be granted and the amount by which such tax should be reduced. The State Treasurer shall notify the petitioner in writing of the time and place fixed by him for such hearing. After such hearing, the State Treasurer shall make such order in the matter as is just and lawful and shall furnish a copy of such order to the petitioner.

Section 14. (a) Every decision of the State Treasurer shall be in writing and notice thereof shall be mailed to the person rendering or performing services within ten (10) days, and all such decisions shall become final upon the expiration of thirty (30) days after notice of such decision shall have been mailed to the person rendering or performing services, unless proceedings are taken within said time for review thereof as hereinafter provided.

(b) The district court of the county wherein the taxpayer resides or has his principal place of business shall have original jurisdiction in proceedings to review all questions of law and fact determined by the State Treasurer

in administering the provisions of this act by writ of certiorari to the State Treasurer. If the taxpayer is not a resident of this state or has no principal place of business in this state, such venue shall be in the City and County of Denver. Such writs of certiorari shall be issued by the clerk of the court upon the duly verified petition of the taxpayer, filed within twenty (20) days after notice of the decision of the State Treasurer in any such matter. The writ shall be served within five (5) days after its issuance and shall be returnable, at such times as the court may determine, not less than ten (10) days nor more than twenty (20) days after the date when the writ was issued. The State Treasurer shall forthwith certify the record of its proceedings to said court. The procedure therein shall be in conformity with the code of civil procedure.

(c) Before making application to the district court for a writ of certiorari, the party making such application shall file with the State Treasurer a bond in twice the amount of the unpaid taxes, interest and other charges audited and stated in the determination and decision of the State Treasurer with surety as is now provided in other cases on appeal, or at his option may deposit lawful money of the United States in the same manner as before provided.

(d) The decision of the district court may be reviewed in the Supreme Court upon writ of error by any party.

Section 15. (a) All notices required to be given to the person rendering or performing services, under the provisions of this act, shall be in writing and if mailed postpaid by registered mail, 'return receipt requested' to him at his last known address, shall be sufficient for the purposes of this act.

(b) Every hearing before the State Treasurer shall be held in the county wherein the taxpayer resides or has his principal place of business, unless the taxpayer consents that such hearing shall be in the City and County of Denver.

Section 16. The license and tax imposed by this act shall be in addition to all other licenses and taxes imposed by law, except as herein otherwise provided.

Section 17. It shall be unlawful for any person rendering or performing services to refuse to make any return provided to be made in this act or to make any false or fraudulent return or false statement on any return or fail and refuse to make payment to the State Treasurer of any taxes collected or due the state, or in any manner evade the collection and payment of the tax, or any part thereof, imposed by this act, or for any person to fail or refuse to pay such tax, or evade the payment thereof, or to aid or abet another in any attempt to evade the payment of the tax imposed by this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. Any corporation making a false return or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor. Any court of competent jurisdiction, including the justice court, of the county in which the offender resides, or, if a corporation, then the county of its principal place of business, shall have jurisdiction to enforce this section.

In addition to the penalties, provided by this act, any person who shall knowingly and willfully swear to or verify any false statement shall be guilty of the offense of perjury and on conviction thereof shall be punished in the manner provided by law.

Section 18. Any person guilty of a misdemeanor, as defined and declared in this act, upon conviction, shall be punished by a fine of not exceeding One Thousand Dollars ($1,000.00), or by imprisonment not exceeding six (6) months in the county jail, or both such fine and imprisonment.

Section 19. The administration of this act is vested in and shall be exercised by the State Treasurer, who shall administer this act by means of or through the department

or agency now or hereafter designated or established for the purposes of collecting the excise taxes provided by and enforcing the provisions of the 'emergency retail sales tax act of 1935.' The State Treasurer shall prescribe forms and reasonable rules and regulations in conformity with this act for the making of rules and for the ascertainment, assessment, and collection of the taxes imposed hereunder and for the proper administration and enforcement of this act. General and special rules may be adopted, amended, or rescinded by the State Treasurer only after public hearing or trial to be heard thereon, of which proper notice has been given. General rules shall become effective ten (10) days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten (10) days after notification to or mailing to the last known address of the individual or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the State Treasurer and shall become effective in the manner and at the time prescribed by the State Treasurer. The State Treasurer shall cause to be printed for distribution to the public the general rules and regulations as herein provided.

Section 20. (a) It is the specific purpose and intention of the General Assembly in the passage and adoption of this act to provide additional Public Revenue to defray the expenses of the operation of state government, and to provide funds for general relief and other governmental purposes, and the revenue derived under this act shall, from time to time, upon the receipt thereof, by the State Treasurer, be deposited by him in the General Fund of the state. Three per cent (3%), or so much thereof as may be necessary, of the funds derived from this act, are hereby appropriated and allocated for the administrative expenses of the state in administering this act. The costs and expenses of administration and enforcement shall be paid out of said three per cent (3%), upon vouchers issued by the State Treasurer and warrants of the Auditor of State. The

remainder of said funds shall be appropriated for the purposes specified by the General Assembly.

Section 21. Any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under former statutes relating to an excise tax on services shall be held as remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order, which can or may be rendered, entered, or made in such actions, suits, proceedings or prosecutions, imposing, inflicting or declaring such penalty, forfeiture or liability, likewise any remedy for the collection of any liability, afforded by the prior laws shall continue in force for the purpose of the collection of such liability.

Section 22. If any section, subsection, sentence, clause or phrase of this act is, for any reason, held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions *or* this act. The General Assembly hereby declares that it would have passed this act, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

Section 23. The General Assembly hereby finds, determines and declares that this act is necessary for the immediate preservation of the public peace, health and safety.

Section 24. In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.

APPROVED: May 1, 1939."

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Supreme Court of the United States

October Term, 1939.

No. 719.

THE COLORADO NATIONAL BANK OF DENVER,
a National Banking Association,
Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

REPLY BRIEF OF APPELLANT.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

REPLY BRIEF OF APPELLANT.

INTRODUCTORY STATEMENT.

In this reply to appellee's brief, it is not our purpose to repeat any of the arguments made in our opening brief filed herein, nor to reply, in detail, to all of appellee's contentions or to all of his citations. We consider many of his points sufficiently answered, and many of his citations

sufficiently explained, in our opening brief, or as needing neither answer nor explanation. We intend to avoid both repetition and needless argument. Consequently, our silence upon any subject is not a concession on our part of the correctness of the position taken by appellee upon it. His principal contentions, which we believe may merit or require reply, are indicated in the headings which follow, though we have not arranged them in the order in which he advances them nor used the exact words of his headings.

All italics in this brief are ours.

1. *Reply to argument that constitutional questions were not properly preserved and are not involved.*

Permeating appellee's entire brief is his argument that the constitutional questions upon which we rely were not properly raised in the court below, and so may not now be considered in this court. His specific statement in this respect is made toward the end of his brief, which we quote with our own insertions of parenthetical numbers, as follows:

> "We must here again point out the fact that these contentions are not in the pleadings, or properly before either the Supreme Court of Colorado or this Honorable Court on Appeal. Appellant is bound by its answer filed in the original case. (1) That answer contains no allegation that the Public Revenue Service Tax Act is contrary to the Constitution of the United States or the laws of the State of Colorado; except that the bank is immune by virtue of its being a federal agent. (2) The findings of law entered by the trial court fail to cover these contentions. (3) They were not included in the bill of exceptions and assignments of error filed with the Supreme Court of Colorado in the case of Bedford, Treasurer, v. Bank, the subject matter of this appeal." (Appellee's Brief, pages 28-29.)

The foregoing is wholly erroneous—probably due to oversight arising through the appellee's representation in this court and in the state courts by different assistant attorneys general. The errors are easily demonstrated.

As to proposition numbered (1) above, contrary to the statement therein made, the bank's answer alleged the following:

> "8. That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both.
>
> 9. That the said controversy arises because of the plaintiff's said rulings, regulations or interpretations of the said Service Tax Act and the Bank's contentions that they are invalid, unlawful, unconstitutional and improper as applied to the Bank; and that its said contentions are as follows, to-wit:
>
> (1) That the said Service Tax Act expressly provides in part, in recognition of the Constitution of the United States and of the Acts of Congress, restricting taxation of national banks, that 'all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt from taxation,' under the said Act; that the depository service of the Bank is part of its banking business under its federal charter and within the said quoted exemption; *and that the said quoted provision should be construed and interpreted as exempting the Bank's said service from taxation because it would otherwise be subjected to the other provisions of the said Act, which must then be held unlawful and unconstitutional as against it and which are as follows, to-wit:*"

(R. 8, and then follow specifications (a) to (g), inclusive, pleading, in detail, the various methods in which the Service Tax Act violates the bank's federal rights unless the bank's services are exempt.)

And the answer then proceeds:

> "(2) That the Bank, as a national bank, is a governmental agency or instrumentality of the United States; that the defendant in enforcing, or attempting to enforce, the said Service Tax Act as to the Bank, as hereinbefore alleged, is imposing a tax against the Bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his rulings, regulations or interpretations with respect thereto is seeking to deprive the Bank of a right, privilege or immunity secured to it by the Constitution of the United States." (R. 10.)

Note that by these allegations, the bank contended and alleged, in the alternative, that the state law, if properly construed, exempted its services from taxation, and that, if otherwise construed and applied, it would violate the United States laws and Constitution. In so doing, the bank followed a course approved in *First National Bank v. Anderson*, 269 U. S. 341, 345; 46 S. Ct. 135, 137—a case which appellee cites and quotes.

As to these allegations and contentions, the trial court, in its first judgment and decree (contrary to appellee's statement numbered (2) that it failed to "cover" them), found and determined:

> "That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the

services performed by the defendant in operating safety deposit boxes and vaults are incident to and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937, the defendant Bank as the one rendering or performing such services *would be the taxpayer, or, if not, would be burdened by such a tax;* and that, therefore, the said services are by Section 7 of the said Act expressly exempt from taxation under it as 'services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado.'" (R. 16.)

And it decreed:

"1. That all services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the said service tax law of Colorado." (R. 17.)

Appellee's next statement, numbered (3), that the bank did not include these matters in a bill of exceptions or in assignments of error in the Colorado Supreme Court in the case of *Bedford, Treasurer, v. the Bank* (R. 19), indicates to us some misunderstanding. That case (see R. 19, et seq.) was the first cause on error; *prosecuted by the Treasurer to seek a reversal of the district court's said decision in favor of the bank.* The bank had no reason to include, and in fact could not include, either a bill of exceptions or assignments of error, in the Treasurer's review of a decision of the district court in which the bank was successful.

It was not until the Colorado Supreme Court had held, in reviewing the first judgment and decree, that the bank's

services were *not* exempt, and the district court, upon remand, was about to enter its second judgment and decree, that the bank could do anything further to preserve its rights under the United States Constitution and laws, with respect to the burdens then and for the first time cast upon it.

That it then did so is shown by its bill of exceptions (R. 31-34), in which it made its objections and exceptions specifying, in detail, and specifically naming Art. I, Sec. 8; Art. II, Sec. 10; Art. V of Amendments; Art. XIII, Sec. 1, of Amendments; and Art. XIV, Sec. 1, of Amendments, of the United States Constitution (see R. 32-34).

These same grounds were assigned as error in the Colorado Supreme Court in the cause on error, prosecuted by the bank (see R. 38-41), and are assigned as error in this court (see R. 43-46).

That these federal questions were inherent and presented in this litigation at its inception is shown also by the Treasurer's own allegation (admitted in the answer) made in his verified petition:

> "The nature of such controversy (meaning the controversy between him and the bank to be decided in the litigation), in substance, is that the act in naming banks as rendering a taxable service was, in effect, *imposing a tax upon banks in conflict with federal law and hence, invalid as to banks:*" (Par. VIII, R. 4.)

All of the foregoing, it seems, have been overlooked or forgotten. Overlooked or forgotten also is the position taken by the Treasurer in the Colorado Supreme Court as to the involvement of United States constitutional questions. When that court at first affirmed the first judgment

and decree of the district court (R. 18), the Treasurer in his petition for a rehearing filed in that court, which was granted (R. 19), said:

> "The primary purpose of this action was to obtain a judicial interpretation of the meaning of certain provisions in the Public Revenue Service Tax Act of 1937. Specifically, the interpretation sought was, whether or not the burden of the tax imposed by the act is upon the one performing the service or upon the consumer or user of the service, *and whether or not the duty of collecting such service tax imposes upon an agency of the United States Government an unconstitutional burden.* The equally divided opinion of this court, without written opinion, leaves us without any clear and adequate judicial interpretation of the questions raised.
>
> • • • • • •
>
> If the service tax is judicially held to be imposed upon the consumer or user of the service, as above indicated, then the other sole remaining question would be whether or not the duty of collecting and remitting the tax would be an unconstitutional burden upon the national bank. *Such a question would be one subject to review by the United States Supreme Court, and for such purposes a clear and concise opinion of this court should be given.*"

Furthermore, it clearly and unmistakably appears from the Colorado Supreme Court's opinion (R. 19) that it actually considered these federal questions and decided against the claims of federal right, and the decision of the question was essential to the judgment rendered. (*Chambers v. Baltimore*, 207 U. S. 142, 28 S. Ct. 34.)

As we view the case, no record could be stronger in warranting exercise of jurisdiction by this court. Neither

the record nor any of appellee's cited cases defeat it. We discuss but a few of them under the heading

2. *Reply to argument that state court's decision was of a local question and is binding on this court.*

We understand appellee's theory to be that, because the state supreme court held, as he believes, that the bank, as the performer of services is not the taxpayer, this court may not inquire into the matter, though the state supreme court also held, affirming the district court's second judgment and decree, that the bank must pay the tax, *whether collected or not from the user of its services.*

He relies upon *Farncomb v. Denver*, 252 U. S. 7, 40 S. Ct. 271, which dealt with the validity of a charter provision of the City of Denver relating to local improvement assessments, previously construed by the Colorado Supreme Court, and as so construed held valid in *Londoner v. Denver*, 210 U. S. 373, 28 S. Ct. 708. He also relies upon *Alvard v. Johnson*, 282 U. S. 509, 51 S. Ct. 273. It appears from this cited case that the tax was a "property" tax—a tax upon the plaintiff's tangible property, measured by his income from its use. It was a tax, *in lieu of all other taxes*, levied state-wide against the property of all persons engaged, as the plaintiff was, in using the state's roads, rights of way, etc. It was not in any respect a tax upon the plaintiff's franchise, occupation or business.

In the cause at bar, however, the tax in question must be considered as a *tax upon the bank's safe-deposit business.* It cannot be considered a *property* tax upon the bank's vaults and safe-deposit boxes, measured by its income therefrom, because the Treasurer, by his demurrer, has admitted the allegations of the bank's answer that the state has *elected (by its income tax law, S. L. of Colo. 1927, Ch. 175, Sec. 2, e, (1)) to tax and is taxing the bank, measured by its net income (see paragraph 7, R. 8, and sub-paragraph (5), R. 10-11), and that its vaults and safe-deposit boxes, as*

fixtures in its banking house, are subject to an ad valorem tax and are so taxed as real estate (see paragraph 6, R. 7). If the service tax is a valid property tax measured by income, as in *Alvard v. Johnson,* then the bank will be taxed three times on the one thing. But R. S. Sec. 5219 prohibits state taxation of national banks' real property, except as other real property is taxed.

As we consider this cause, it is not one in which this court is bound by the state court's construction of the Service Tax Act to the effect that the user of the bank's services is the taxpayer, if it made such a construction. Because the act also provides that all services are exempt which the state is prohibited from taxing by the laws or Constitution of the United States, the proper construction of the act for the application of the exemption is not purely local, and the state court cannot, by an erroneous construction, frustrate a valid claim of a federal immunity and foreclose this court from considering it. The correct rule, applicable to this cause, and permitting this court's determination of whether or not the bank is the taxpayer, was stated by this court in *St. Louis S. W. R. Co. v. Arkansas,* 235 U. S. 350, 362, 35 S. Ct. 99, 102, as follows:

> "But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. *We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state.*"

The foregoing was cited and again stated in substance in *St. Louis, etc., Cotton Co. v. Arkansas,* 260 U. S. 346, 348; 43 S. Ct. 125; and these two cases were cited with approval on this point in *Federal Land Bank v. Crosland,* 261 U. S. 374; 43 S. Ct. 385 (see appellant's brief, page 33),

which in turn was followed and cited with approval in *Pittman, Clerk, v. H. O. L. C.*, 60 S. Ct. 15, decided at this court term (see appellant's brief, page 23).

In our opinion, however, the Colorado Supreme Court did *not* hold that the bank is *not* the taxpayer. Its decision seems to us to be to the contrary. The Colorado Supreme Court said: "The bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank *it is a taxpayer*" (R. 25). Upon remand, the district court decreed that, to comply with the terms of the act, *the bank must pay the tax whether or not it collects the amount thereof from its customers.* The Colorado Supreme Court thereafter affirmed that decree. The Treasurer alleged that the bank "refused to collect or remit any of said taxes or in any manner comply with the said law" (see paragraph VI at R. 3), and the bank admitted that allegation (R. 6). It follows from this that we have the state court's adjudication that the bank *is the taxpayer* and such is "*the effect of the law as applied and enforced by the state.*" We submit that a state may not, upon threat of duress, force a national bank to be a tax collector, and, upon refusal, to be a taxpayer.

3. *Reply to argument that R. S. Sec. 5219 prohibits no more than discriminatory taxation of national bank shares, and that its sole purpose is to prevent discrimination against national banks in their competition with other moneyed capital.*

This is another thought or argument permeating appellee's brief and is an entirely different position from that which he took in the courts below. There he conceded that R. S. Sec. 5219 prohibits all state taxation of national banks, except as in the section provided (see appellant's brief, page 15). The Colorado Supreme Court held and said:

"It heretofore has been determined that a state can only tax a national bank with the consent of Congress *and not otherwise.* First National Bank v. Anderson, 269 U. S. 341; 46 Sup. Ct. 135, 70 L. Ed. 295, and numerous other authorities. *Section 5219, supra, furnishes the exclusive authority governing state taxation as to national banks.* Bank of California v. Richardson, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372." (R. 20-21.)

Now, however, the appellee attempts to contend that R. S. Sec. 5219 should be construed as prohibiting only discriminatory taxation of national bank shares, and not other state taxation of a national bank, its business or its property. To do so, he quotes, from *First National Bank v. Anderson,* 269 U. S. 341; 46 S. Ct. 135, that part of the opinion relating to the discrimination involved in that particular case, and infers that the prohibition of R. S. Sec. 5219 is thus limited to discrimination only. But the court in that case did not intend to, and did not, so limit the prohibition. This is clearly shown by that portion of the opinion, not quoted by the appellee, appearing at page 347, reading as follows:

"National banks are not merely private moneyed institutions, but agencies of the United States created under its laws to promote its fiscal policies; and hence *the banks, their property, and their shares cannot be taxed under state authority, except as Congress consents, and then only in conformity with the restrictions attached to its consent.* Des Moines National Bank v. Fairweather, 263 U. S. 103, 106, 44 S. Ct. 23, 68 L. Ed. 191, and cases cited. *The early legislation respecting these banks contained a restricted consent, which afterwards became Section 5219 of the Revised Statutes.*"

That R. S. Sec. 5219 should be construed as prohibiting state taxation of national banks, *their property, and*

their business, as well as their shares, is founded upon numerous decisions of this court commencing with *McCulloch v. Maryland*, 4 Wheat. 316, and upon the recognition by Congress, by the legislatures of states, by state administrative regulations, and by state court decisions, of the principle announced in the federal cases over a period of 121 years. An example of state court recognition is that part of the Colorado Supreme Court's opinion quoted above, an example of recognition by state administrative regulation is Section 10 in this matter, quoted at R. 2, and an example of a state legislature's recognition is the Colorado income tax law stated and quoted, in part, in sub-paragraph (5) at R. 10-11.

McCulloch v. Maryland first announced that states were prohibited from taxing banks (including their property, and business), created by Congress under governmental powers, and that permission to so tax must come from Congress. Acquiescing in that and in a long line of similar and subsequent decisions, Congress has, from time to time, extended permission until the full measure of its permission is now embodied in R. S. Sec. 5219 as amended. Thus the section has come to be construed, as stated by the Colorado Supreme Court, supra, as furnishing "the *exclusive* authority governing state taxation," and, being *exclusive*, the section is also construed as *prohibiting* all forms and methods of state taxation not so expressly authorized.

If this be not so, then new forms and methods of state taxation never dreamed of by state legislators or by Congress are subject to state adoption; and the control exercised by the government over national banks through various governmental departments and agencies, such as the Comptroller of the Currency and the Federal Reserve System, will soon be materially weakened unless new federal legislation be adopted, which for many years has been considered wholly unnecessary. Any variation of, or departure from, a principle so long accepted by Congress

and so firmly imbedded in the laws of the nation should come from Congress. It can easily permit state taxation of national banks, their business and property, in new forms and manner, whenever desirable. We respectfully submit that, in this, Congress, and not the courts, should lead the way.

Appellee cites no authorities to sustain his attempt, first made in this court, to disturb this ancient principle of national banking law. We adhere to the position taken in the opening brief of the appellant that this is a case involving a *congressionally recognized immunity,* as distinguished from a case in which the immunity may or may not be *implied* by a court.

4. *Reply to argument that the safe-deposit business is not a national banking function.*

On this feature of appellee's argument he has no supporting authorities, whatever, other than the decision of the court below, and, therefore, contends that, because a national bank is not *required* to conduct a safe-deposit business, or to render that particular service, it is not a banking function.

The Banking Act does not purport, and has never been construed, to "list" or enumerate all of the banking powers thereby conferred upon national banks; nor are the banking powers conferred limited to those particularly mention in R. S. Sec. 5136, as amended, U. S. C. A., Title 12, Sec. 24 (see *Carlisle, etc., Bank v. Graham,* 100 U. S. 699). Instead, the section provides that a national bank shall have the power "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the *business of banking.*" What may be the "business of banking" is left to the courts for determination in the light of what is generally understood thereby and of the common law. So, it is that all of the courts, with the exception

only of the Colorado Supreme Court in this case, have held and said that the safe-deposit business was the first, and at first the only, function of banking, and, therefore, when Congress authorized national banks to do a banking business, it authorized them to conduct the safe-deposit business as a banking function.

If, within the discretion delegated by Congress to a national bank's board of directors and duly authorized officers, a national bank does any of those things which are within the broad general definition of the business of banking, then the powers to do those things are included in the powers necessary to carry on the business of banking. They are not rendered unnecessary, within the meaning of the act, as argued by the appellee, because a bank is not *required* to do them.

The exercise of all of the powers granted by Congress is, in each instance, permissive and not mandatory. A national bank may, but need not, as banking functions, do a trust business, have a savings account department, act as escrow agent, make collections, accept special deposits, conduct a safe-deposit department, and a number of other things, none of which are specifically mentioned or listed in R. S. Sec. 5136. But when any national bank does any of these things, because its board of directors or officers deem it advisable for the benefit of the bank, to meet competition, or for any other reason, then the bank is exercising a congressionally granted power "*necessary to carry on the banking business.*"

Further recognition of a national bank's ownership and operation of vaults and safe-deposit boxes and fixtures is the requirement that a national bank, in certain instances, must procure the approval of the Comptroller of the Currency as to the investments made in bank premises. In this case, it is admitted in the pleadings that the bank owns its bank building, and that its vaults, safe-deposit boxes and fixtures are part thereof, in all of

which it has a large investment. (See U. S. C. A., Title 12, Sec. 371 d; Act of Dec. 23, 1913, c. 6, Sec. 24 A; as amended June 16, 1933, c. 89, Sec. 14, 48 Stat. 184; as amended August 23, 1935, c. 614, Sec. 203 (a), 49 Stat. 704.)

Considering the historical aspects of this part of banking and the former opinions of this court upon this subject, as well as the soundly reasoned and logical case of *Bank of Calif. v. Portland*, 157 Ore. 203, 69 Pac. (2d) 273, (certiorari denied 302 U. S. 765), which cannot be distinguished from this case, and that there are no decisions or authorities in support of the appellee's contention and of the decision in the court below, we believe that this court should adhere to the doctrine which it has several times announced, and hold that the conduct of a safe-deposit department is a national banking function.

CONCLUSION.

Our efforts, in this brief, have been to reply to the arguments of the appellee on the substantial questions involved in this cause, and to show the fallacies of his contentions.

We trust this will be an aid to the court in considering, and in correctly determining, this cause, the final decision of which we believe should be a reversal of the court below.

Respectfully submitted,

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER,
Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

STATEMENT OPPOSING JURISDICTION.

BYRON G. ROGERS,
Attorney General of Colorado,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER,
A NATIONAL BANKING ASSOCIATION,
Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO,
Appellee.

STATEMENT AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL.

Now comes the appellee above named, and contravening the statement as to the jurisdiction of the Supreme Court to review on appeal filed herein by appellant, contends that the Supreme Court of the United States has no jurisdiction upon appeal to review the judgment, decree and decision

in question, and the matters pertinent thereto are as follows:

I.

Appellant has failed to comply with Rule 12 of the Rules of the Supreme Court of the United States, and the question as to whether the Federal courts have jurisdiction has been passed upon by a Federal court.

Rule 12 of the Rules of the Supreme Court of the United States requires that if the appeal is from a State court, the statement of the appellant shall "specify the stage in the proceedings in the court of first instance, and in the appellate court at which and the manner in which the Federal questions sought to be reviewed were raised." This cause, while bearing the Colorado Supreme Court number 14684, is a continuation to final determination by the Supreme Court of the State of Colorado of that cause heretofore determined in the Supreme Court of the State of Colorado bearing docket number 14405, to which appellant refers in its statement of jurisdiction, and portions of which record have been ordered certified to the Supreme Court in the praecipe filed by appellant. Appellant's statement and praecipe, however, omit that portion of the record and proceedings had in said cause number 14405 in connection with removal proceedings from the District Court of the City and County of Denver, State of Colorado to the United States District Court in and for the District of Colorado, and omit reference to or inclusion of the petition for removal to the Federal court filed by appellant in the State court, the order of the State court removing the same, and the subsequent order of the Federal court remanding said cause from the United States District Court for the District of Colorado to the District Court of the City and County of Denver, State of Colorado, where the same originated. In omitting from its statement these portions

of the record and failing to set forth in its statement this stage in the proceedings in the court of first instance in which and the manner in which the Federal questions sought to be reviewed were raised, appellant has failed to comply with the requirements of Rule 12 aforesaid.

II.

A Federal court having passed upon the Federal question adversely to appellant, the same is res adjudicata, and having failed to appeal from the order of the Federal court appellant has waived right to appeal to the United States Supreme Court.

Appellant filed its petition for removal from the Colorado State courts to the Federal District Court in Colorado, setting forth among its grounds for removal the following (R. 1-8):

> "(1) That this defendant is a National Banking Association, organized and existing under the laws of the United States.
>
> "(2) That this action was brought and is being prosecuted to determine, and the basic question involved is, whether or not the said United States Constitution and Laws, including U. S. C. A. Title 12, Section 548, do not exempt the defendant bank from the said threatened taxation, or whether or not they grant the right or privilege to tax a National Bank in the manner and form specified in the said Service Tax Act."

Said petition sets out at length each and every allegation included in appellant's statement as to jurisdiction filed herein, as well as the "Federal questions" here sought to be reviewed.

The State court, upon said petition, entered its order of removal to the United States District Court in and for the District of Colorado. Upon lodgment in the United States District Court, appellee filed his motion to remand upon

the grounds that no Federal question was involved. This motion was argued before the Honorable J. Foster Symes, Judge of the United States District Court in and for the District of Colorado, who granted the same and entered the following order remanding (R. 11):

> "This cause comes on now to be heard on the motion of the plaintiff, to remand this cause, and is argued by counsel, Elmer P. Cogburn, Esquire, appearing as solicitor for the plaintiff, and Walter W. Blood, Esquire, appearing as solicitor for the defendant, The Colorado National Bank. And thereupon, on consideration thereof;
>
> "It is ordered by the Court that the said motion be, and the same is hereby, granted, and that this cause be, and the same is hereby remanded to the District Court of the Second Judicial District of the State of Colorado, sitting within and for the City and County of Denver, from whence it came there to proceed according to law; and that the clerk of this Court transmit to said district court a certified copy of this order without delay.
>
> "It is further ordered, adjudged, and decreed, that the plaintiff do have and recover of and from the defendants his costs by him in this behalf and in this court laid out and expended, to be taxed, and that execution issue therefor as at law.
>
> A true copy as of record
>
> Teste:
>
> CHARLES W. BISHOP,
> *Clerk,*
>
> By WILLIAM GRAF,
> [SEAL.] *Deputy Clerk."*

The Federal questions sought to be reviewed by appellant had been determined by a Federal court adversely to appellant, and no appeal was taken therefrom. Appellant is bound thereby.

III.

As to the Colorado Statute Drawn in Question.

The validity of the statute of the State of Colorado which appellant seeks to review, is not questioned. On the contrary, appellant seeks to avoid the operation of that statute by invoking the protection of the Federal statute granting permission to states to tax National Banks (U. S. Revised Statutes Sec. 5219 as amended) (U. S. C. A., Title 12, Sec. 548), and the claim made by appellant in this cause that the Colorado statute involved is a tax upon a Federal agency, to-wit: a National bank. The Supreme Court of the State of Colorado in its decision on the facts presented declared:

> First: That the tax imposed by the Colorado Act was a tax, not upon the bank, but upon the user of the bank's depository services, and
>
> Second: That depository facilities are not banking services. (Bedford, Treasurer vs. Colorado National Bank, 104 Colo. 311, 91 Pac. (2d) 469) attached to appellant's statement as to jurisdiction as exhibit "D".

Hence, it is apparent that the court found that the Colorado National Bank, in engaging in the safety deposit box business, is engaging in a business which is not banking, but which is foreign thereto and wholly unnecessary to the rendition of the bank's services as a Federal agent engaged in banking under Federal laws. In other words, when the bank indulges in a business beyond the scope of its banking business, it loses the protection afforded by Federal law to Federal agencies, and falls within the distinction of *Alward* v. *Johnson*, 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496, where the Supreme Court of the United States sustained a state tax upon the gross receipts of an independent contractor carrying the mails. In that case the taxpayer operated an automotive stage line. Two-thirds of

his gross receipts, upon the whole of which he was taxed, were derived from carriage of United States mail, and the remainder from carriage of passengers and freight. The court found that the property used in earning these receipts was devoted chiefly to carrying the mails, and that without his contract with the government the stage line could not be operated profitably.

Referring further to the Colorado taxing statute involved, the distraints, penalties and fines imposed by that statute are in no sense taxes upon the bank or banking business, but are remedies given by the statute for the collection of the tax in the hands of the collector. The Act further provides compensation to the bank for its services in collecting the tax, and also provides that where the person engaged in rendering the taxable services holds a license under the provisions of any statute requiring the issuance or securing of a license, that the state service license is unnecessary. The bank being licensed under Federal laws, as well as state laws, comes within the foregoing exception, and it is unnecessary for the bank to apply for a service tax license or to pay the fee for its issuance. Hence, there is no tax or charge upon the bank itself. (Service Tax Act of 1937 as amended and reenacted, Chapter 158, Session Laws of Colorado 1939.)

> "Section 4. (a) It shall be unlawful for any person to engage in the business of rendering or performing services as the same is defined in this act, after the effective date of this act without first having obtained a license therefor, which license shall be granted and issued by the state treasurer and shall be in force and effect until the thirty-first day of December of the year in which it is issued, unless sooner revoked; *except a person who has obtained and who holds a license issued under the provisions of any statute requiring the issuance or securing of a license* and a person engaged in the business of rendering or performing services of a professional, technical or scientific nature."

IV.

As to the Federal Questions Being Substantial and Their Presentation.

The tax imposed by the Colorado statute having been declared to be a tax upon the user of the services, and there being no tax directly imposed upon the bank, and the bank being engaged in a business wholly foreign and unnecessary to its functions as a National bank, there is no substantial Federal question involved.

In the case of *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96, the Supreme Court, in imposing a state obligation for liabilities assumed by the defendant bank for monies owed the state collector of taxes for state, county and school district taxes in the form of an assessment imposed upon shares of capital stock of the bank, declared:

> "Not every question of Federal law emerging in a suit, is proof that a Federal law is the basis of the suit. The tax here in controversy, if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The Federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the Federal statute consenting, subject to restrictions that such assessments may be made. (Citations.) It must also be consistent with the Constitution of the United States. (Citations.) If there were no Federal law permitting the taxation of shares in National banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. (Citations.) That there is a Federal law permitting such taxation, does not change the basis of the suit, which is still the statute of the state, though the Federal law is evidence to prove the statute

valid. • • • Here the right to be established is one created by the state. It is unimportant that Federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority a suit brought upon a state statute does not arise under an Act of Congress or the Constitution of the United States because prohibited thereby."

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Counsel for Appellee.

MAR 29
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLEE

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HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLEE

STATEMENT OF CASE

We are unwilling to accept appellant's exhaustive statement of the case without qualifications, since it covers many matters and details which were neither in issue nor presented to the State Court for determination. Therefore, in lieu of appellant's compendium, we submit our own statement, as follows:

First: Jurisdiction is invoked in this cause solely upon the issues of fact raised in the pleadings and determined by the decision of the State Court, namely: whether or not appellant, being a national bank, organized and operating under the Federal Banking laws, when engaging in the safety deposit box business as an adjunct to its banking

business, is a federal agency or is engaged in carrying out a federal function so that the Public Revenue Service Tax Act of the State of Colorado, when applied to the safety deposit box business, would, (a) impose a burden upon the bank's character and functions as an agency of the federal government, or, (b) constitute an attempt to tax a national bank contrary to the ban of federal statutes.

Second: The issues of fact and the law applicable thereto found and determined in this cause, are succinctly set forth in the opinion of the Supreme Court of the State of Colorado in its decision in the matter of *Bedford, Treasurer vs. Colorado National Bank,* (104 Colo. 311, 91 Pac. (2d) 469, Tr. Rec. pages 19 to 29) as follows:

> "This action was brought by plaintiff in error (Bedford) under the Uniform Declaratory Judgment Act '35 C.S.A., ch. 93, Secs. 78 to 92, to obtain a judicial declaration that the State has power to compel national banks to collect and remit service taxes upon depository services performed by such banks to the public in compliance with the Public Revenue Service Tax Act of 1937. (S.L. '37, ch. 240)
>
> "Upon the filing of an amended petition, defendant in error, (the bank) answered, to which answer plaintiff in error demurred. The demurrer was overruled. It was previously agreed that the party against whom the ruling on demurrer was made, would stand upon such ruling. Plaintiff in error made that selection, and the Court decreed 'that all services performed by defendant in operating safety deposit box vaults are exempt from taxation' under the Public Revenue Service Tax Act, supra. Reversal of that decree is sought here, *and the assignment of errors, in substance, raised two questions, namely: (1) Upon whom is the serv-*

ice tax imposed, the party rendering the service or the one who uses it? (2) Does the requirement to collect and remit the tax upon depository services constitute a burden upon or an interference with the proper functions of a national bank as a governmental agency?" (Transcript record, pages 19 and 20. Italics are ours.)

In reaching its decision, the Supreme Court of the State of Colorado said:

"There is no congressional requirement that a national bank conduct a safety deposit box service. The relationship created under such service is that of bailor and bailee and not that of debtor and creditor. Tuckerman v. Mearns, 262 F. 607. A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business."

(Transcript record, page 26.)

"We conclude, that the tax created by the service tax act is imposed, not upon the bank but upon the user of the service, and that the requirement that the bank collect and pay the same to the treasurer, under the circumstances detailed in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the bank as a governmental instrumentality." (Transcript record, page 29.)

The case was remanded to the District Court of the City and County of Denver, Colorado, the trial court, under the following instructions:

"Now, therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such

further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein."

The trial court, in response to such remittitur, did thereupon enter judgment in conformity therewith, from which judgment, in order to perfect its appeal to this Court, the bank took exception and appealed again to the Supreme Court of the State of Colorado as plaintiff in error, under the title of *"Colorado National Bank vs. Bedford, Treasurer."* On the 8th day of January, 1940, the Supreme Court of the State of Colorado rendered its decision in this cause, affirming its former decision in the matter of *Bedford, Treasurer vs. Bank*, supra, in the following language:

> *"The issues presented in this case are in all respects identical with those raised in Bedford, State Treasurer v. Colorado National Bank*, 104 Colo. 311 (91 P. (2nd) 469), in which our holding was adverse to the contentions advanced by plaintiff in error bank. Consistently with our conclusions therein announced, the judgment here under consideration is affirmed." (Transcript record, page 41. Italics are ours.)

These two cases, which are made a part of the record in this cause, constitute one and the same cause from which this appeal is taken. The issues of fact presented therein and determined by the Supreme Court of the State of Colorado in rendering its decisions adverse to appellant, are confined solely to the questions:

First: Whether the Public Revenue Service Tax Act of the State of Colorado imposes a tax upon the user, and

Second: Whether a national bank as such, when it conducts a safety deposit service is entitled to immunity.

SUMMARY OF ARGUMENT

I.

There is no federal question involved to warrant an assumption of jurisdiction by this Court.

We submit the propositions: (1) that the highest court of the State, (the Supreme Court of the State of Colorado) having construed a state statute, (the Colorado Public Revenue Service Tax Act) and made findings of fact in connection therewith, the Supreme Court of the United States will not, on appeal, disturb such construction and will be bound by the findings of fact; and (2) that the record fails to disclose facts presenting a federal question which would warrant assumption of jurisdiction by this Honorable Court.

Rinn v. Bedford, 102 Colo. 475; 84 Pac. (2d) 827;
R.S. 5219 *as amended*, 12 U.S.C.A. Sec. 548;
Farncomb v. City of Denver, 252, U. S. 7, 40 S. Ct. 271;
Alvard v. Johnson, 282 U.S. 509, 51 S. Ct. 273;
First Natl. Bank v. Anderson, 269 U.S. 341, 46 S. Ct. 135;
Gully v. Bank in Meridian, 299 U.S. 109; 57 S. Ct. 96.
Guaranty Tr. Co. v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

II.

The Public Revenue Service Tax Act of Colorado imposes a tax upon the user.

The Public Revenue Service Tax Act of the State of Colorado, by making it unlawful for the performer of the taxable services to include the same in his charges, imposes a tax upon the user of the services. Therefore, the Act is in no sense a tax upon the bank.

Session Laws Colorado '37, ch. 240;
Session Laws Colorado '39, ch. 158;
Bedford, Treasurer v. Bank, 104 Colo. 311; 91 Pac. (2d) 469;
McGoldrick v. Berwind-White Coal Min. Co. 60 S. Ct. 388.

III.

The business of operating safety deposit boxes is not a banking function, but is a business purely incidental to banking.

We submit the proposition that the safety deposit box business is not listed among the banking powers conferred by the federal statutes; that the relationship existing between the bank in the conduct of a safety deposit box business and the renters of the boxes being that of bailor and bailee, and the bank having no control or access to the contents of such boxes for use as banking assets, such business is purely an incident to the banking establishment. A national bank, therefore, engaging in such business is engaging in a private operation, and is subject to all state laws affecting that occupation.

Tuckerman v. Mearns, 262 Fed. 607;

R. S. 5136—*as amended*, 12 U.S.C.A. Sec. 24;

Kimen v. Atlas Exchange Bank, 92 Fed. (2d) 615;

First National Bank v. Missouri, 263 U.S. 640, 44 S. Ct. 213.

IV.

The safety deposit box business renders a service which is a proper subject for taxation.

The safety deposit box business, in fact, constitutes a rental of space to the public, and is therefore a service taxable by state law. Section R.S. 5219 is designed solely to prevent state taxation of bank shares, which might be discriminatory to national banks, and is limited to the subject therein enumerated. The Public Revenue Service Tax Act

of Colorado is not a tax on bank shares, nor upon bank property, and therefore is not within the prohibition of that statute.

Rinn v. Bedford, 102 Colo. 475; 84 P. (2d) 827;
James v. Dravo Constr. Co., 302 U.S. 134, 58 S. Ct. 208;
Silas Mason Co. v. Tax Com., 302 U.S. 186; 58 S. Ct. 233;
R.S. 5219 amended, Sec. 3, 12 U.S.C.A. Sec. 548;
Clement National Bank v. Vermont; 231 U.S. 120.

V.

The burdens imposed by the Public Revenue Service Tax Act of Colorado are not repugnant to the United States Constitution or Laws, nor discriminatory. These issues are not properly before this Court.

This cause was decided upon the sole issues as to where the tax was placed, and whether a bank is a federal agency. No other issues being raised or determined by the trial court, constitutional questions cannot be injected herein.

We submit the proposition, however, that the tax imposed by the Public Revenue Service Tax Act of Colorado, is a proper exercise of a state sovereign power to levy and collect taxes, and that the method of collection of those taxes is constitutional and lawful.

Public Revenue Service Tax Act, Section 19, S. L. '39 Colo. ch. 158;

James v. Dravo Constr. Co. 302 U.S. 134, 58 S. Ct. 208;
McGoldrick v. Berwind-White Co., 60 S. Ct. 388;
Covington v. Tax Com. (Ky) 257 Ky. 84, 77 S.W. (2d) 386;
Pierce v. Society of Sisters, 268 U.S. 510; 45 S. Ct. 571;
Northwestern Life Ins. Co. vs. Riggs, 203 U.S. 243;

THE ARGUMENT

I.

THERE IS NO FEDERAL QUESTION INVOLVED TO WARRANT AN ASSUMPTION OF JURISDICTION BY THIS COURT

1. The constitutionality of the Public Revenue Service Tax Act of Colorado was not and is not challenged by this cause. On the contrary, the bank is bound by the decision of the Supreme Court of the State of Colorado in the case of *Rinn v. Bedford* (102 Colorado 477) sustaining the constitutionality of the Colorado Service Tax Act which recognizes the right of the State to enact and enforce such legislation. Appellant, however, claims immunity from the Service Tax Act by virtue of its being a federal institution shielded from State taxation through congressional action (R.S. 5219). Determination of that question called for an interpretation, not only of state, congressional laws, but for the establishment of the status of the bank. In fixing that status, the Colorado court found that the bank, when it engages in the business of renting safety deposit vaults, is not engaged in a banking business, that the tax imposed by the statute was a tax upon the user or lessee of its safety vaults, and that the bank in renting such vaults was not discharging a federal function. From these facts, the Colorado court then held as a matter of law that appellant was and is subject to the provisions of the Service Tax Act and denied immunity.

In cases like the one at bar, involving the construction of State laws by State courts, this Honorable Court has consistently held that it will not disturb the construction placed by the state courts upon its own statutes and that it will be bound by the State courts' findings of fact.

In the case entitled "*Farncomb v. City of Denver* (252 U.S. 7; 40 S. Ct. 271)" it is said:

> "This Court, when dealing with the constitutionality of State Statutes, challenged under the Fourteenth Amendment, accepts the meaning thereof as construed by the highest court of the State. *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U.S. 419, 427."

Again, when called upon to construe a State statute taxing an irrevocable gift inter vivos as a gift causa mortis, this Court said:

> "Since the court below construed the Act of 1923 without regard to the Act of 1929, as embracing the event sought to be taxed and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

(Guaranty Tr. Co. v. Blodgett, 287 U.S. 509, 77 L. Ed. 463.)

Applying these rules to the decisions of the Colorado Supreme Court which appellant seeks to review, it is obvious that those decisions involved no federal questions for consideration by this Honorable Court.

2. The fact that appellant is a creature of Congress engaged in a business declared by Congress to be federal in character, does not, of itself, make it immune from the operation of State laws, and when it engages in a business foreign to the business for which it was primarily organized and wholly unnecessary to the fiscal policy of the United States, it loses its character as a federal instrumentality, and so far as that business is concerned is wholly amenable to State laws.

Counsel for appellant oppose this proposition by the citation of numerous and sundry cases, all of which involve attempts by States to tax national banks on their property or to fly in the teeth of the Congressional prohibition

against discriminatory taxes upon national bank shares and securities; or to levy taxes which would burden or impair the functions of a federal instrumentality in the exercise of a federal function, (eg. Pittman, Clerk v. H.O.L.C. 60 S. Ct. 18; Federal Land Bank v. Crosland 261 U.S. 374; Bank v. Bennett 284 U.S. 239) and seek to avoid those cases which have held that the federal instrumentalities are amenable to State laws.

We, therefore, as supporting our contention that no federal question is herein involved, refer specifically to the case of *Alvard v. Johnson* (282 U.S. 509, 51 S. Ct. 273; 75 L. Ed. 496). In that case the taxpayer operated an automotive stage line. Two-thirds of his gross receipts, upon the whole of which he was taxed were derived from carriage of United States Mail and the remainder from carriage of passengers and freight. He claimed immunity from State taxation as a federal instrumentality because of his mail contract. The court said:

> "Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely." (Alvard v. Johnson—(282 U.S. 509, 514)

Here, as there, the burden of the Service Tax Act, of which appellant complains, "laid upon the property employed, affected operations of the Federal Government only remotely."

Again, in the case of *First National Bank v. Anderson*, 269 U.S. 341, this Court, in applying the prohibition of Section 5219 R.S., qualified the operation of that statute, as follows:

"1. The purpose of the restriction is to render it impossible for any State, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks by favoring shareholders in State banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. (citations)

"2. 'Other monied capital' in the restriction, is not intended to include all monied capital not invested in national bank shares, but only that which is employed in such ways as to bring it into substantial competition with the business of national banks. (citations)

"3. Monied capital is brought into such competition where it is invested in shares of state banks or in private banking; and also where it is employed substantially as in the loan and investment feature of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment. (citations)"
(First National Bank v. Anderson, 269 U.S., 341)

Certainly, the investment of a national bank in safety deposit vaults for rental to the public, is not an investment "by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment." (*First National Bank vs. Anderson*, 269 U.S. 341, 46 S. Ct. 135)

Finally, in the case of *Gully v. First National Bank of Meridian*, 299 U.S. 109, 57 S. Ct. 96, this Court, in denying immunity to the bank, said:

"That there is a federal law permitting such taxation, (a state obligation for liabilities assumed by the defendant bank for monies for State, County and School District taxes) does not change the basis of the suit which is still the statute of the state, though the federal law is evidence to prove the statute valid * * *. Here the right to be established is one created by the state. It is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. *By unimpeachable authority a suit brought upon a state statute does not arise under an Act of Congress or the Constitution of the United States because prohibited thereby.*" (Gully v. First Natl. Bank, 299 U.S. 109, 57 S. Ct. 96—Italics are ours).

It is apparent that a federal instrumentality cannot claim immunity from the operation of state laws because of its federal character, where those state laws operate upon such agencies in their private capacity and do not affect their federal functions. These being the only questions presented by this case, and the Supreme Court of the State of Colorado having construed the Colorado Service Tax Act and applied the same thereto, no federal question is presented for consideration by this Honorable Court, and jurisdiction thereof should be denied.

II.

THE PUBLIC REVENUE SERVICE TAX ACT OF COLORADO IMPOSES A TAX UPON THE USER

That the tax imposed by the *Public Revenue Service Tax Act of Colorado* (S.L. '37 ch. 240 and S.L. '39 ch. 158) is a tax levied upon and paid by the user or beneficiary of the services, is not only the expressed intent and language of the Acts themselves, but is a fact determined in the instant

case by the Supreme Court of the State of Colorado in its decision in the matter of *Bedford, Treasurer, vs. Bank.* (104 Colo. 311, 91 Pac. (2d) 469)

The 1939 enactment of the Colorado Service Tax Act is a re-enactment of the 1937 law. In both these laws, tax is defined as follows:

"Section 2. Definitions.

(f) The term 'tax' means either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax, or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require."
(Public Revenue Service Tax Act, ch. 240, Sec. 2 (f), S. L. '37 page 1145)

Section 5 of that Act, a re-enactment of the '37 law, levies the tax.

"Section 5. From and after the effective date of this Act, there is hereby levied and imposed upon the services specified in this Act, and measured by the amount paid therefor, and there shall be collected and paid:

(c) A tax equivalent to 2% of the value of services rendered or performed by any person engaging or continuing in any of the following businesses * * * banks, finance companies, trust companies and *depositories* * * *."
(Section 5 (c) ch. 240 S. L. Colo. '37 pages 1150-1151. Italics are ours.)

The performer of the services is expressly forbidden by the law to absorb the tax either directly or indirectly, and is required to collect the tax from the user or bene-

ficiary along with and in addition to his compensation for the same.

Section 6 of the *Public Revenue Service Tax Act of Colorado '39* is a re-enactment of the same section of the Service Tax Act of 1937. It prescribes the duties of the person rendering or performing the services, and provides, among other things, as follows:

> "(d) It shall be unlawful for any person rendering or performing services to advertise or hold out or state to the public or to any user, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by him, or that it will not be added to the value of the service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor." (ch. 158, Sec. 6(d) S.L. Colo. '39)

As hereinabove noted, the Supreme Court of the State of Colorado in the case at bar, was called upon for a judicial determination upon whom the service tax of Colorado was imposed namely: the party rendering the service or the one who uses it. (Bedford vs. Colo. Bank, 104 Colo. 311, 313)

The Court then proceeds with an analysis of the statutes hereinabove set forth, and concludes that the tax imposed is upon the user, in the following language:

> "In the instant case, the direct tax burden is not upon the Bank. It is the state's agent to collect and it is compensated for that service. The tax, when collected by the bank, is the property of the state which it holds in trust for the sole use and benefit of the state until paid to the Treasurer, as provided by law. While the Bank is liable to the

state for the tax, the Act itself is so worded that the Bank does not carry any of the tax burden unless it refuses to comply with certain terms of the Act. To that extent, as applied to the Bank, it is a taxpayer within the meaning of Section 2(e) supra, and the liability is a tax within the meaning of Section 2(f) supra. We conclude that the tax created by the Service Tax Act is imposed, not upon the Bank, but upon the user of the service, and that the requirement that the Bank collect and pay the same to the Treasurer under the circumstances detailed in the Act, is not an unconstitutional burden upon, nor does it unlawfully interfere with the Bank as a governmental instrumentality. The constitutional immunity claimed by the Bank, does not apply." (Bedford v. Bank, 104 Colo. 311, 324)

The same conclusion in connection with the burden of the New York City sales tax was recently reached by this Honorable Court in the case of *McGoldrick, Comptroller v. Berwind-White Coal Mining Company*, decided January 29, 1940, as yet unreported in official reports. (60 S. Ct. 388) We quote at length from that decision:

"The question for decision is whether the New York City tax laid upon sales of goods for consumption as applied to respondent, infringes the commerce clause of the Federal Constitution.

* * * * * * * * *

"Pursuant to this authority the municipal assembly of the City of New York adopted Local Law No. 24 of 1934 (published as Local Law No. 25), since, annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in

supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By Sec. 2 the tax was fixed at 'two percentum upon the amount of the receipts from every sale in the City of New York', 'sale' being defined by Sec. 1 (e) as 'any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor'. Another clause of Sec. 2 commands that the tax 'shall be paid by the purchaser to the vendor for and on account of the City of New York'. By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By Secs. 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller who is authorized by Sec. 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. *Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him.* It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or

an agreement within the state 'consummated' there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts.

* * * * * * * * * *

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau, 303 U.S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. *Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited.* The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. *An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate*

commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it.

* * * * * * * * *

"Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. Brown v. Houston, supra; Coe v. Errol, 116 U.S. 517; Pittsburg & So. Coal Co. v. Bates, 156 U.S. 577; American Steel & Wire Co. v. Speed, supra, 520; General Oil Co. v. Crain, 209 U.S. 211; Bacon v. Illinois, 227 U.S. 504. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements." (McGoldrick v. Berwind-White Co. 60 S. Ct. 355, Italics are ours).

The significant portion of the Berwind decision, supra, aside from its fixing the purchaser of goods as the taxpayer, is that it defines the vendors' (in the instant case the performers') status as that, not of a taxpayer charged with the tax, but as an insurer for the benefit of the state.

It is significant that counsel for appellant, in citing the Berwind case (supra) as their authority, should place

reliance upon language appearing in the dissenting opinion, and we respectfully suggest that the Chief Justice's quarrel with the majority decision is not that it placed the tax upon the user, but that it was a tax upon an article of interstate commerce. Counsel have omitted the Chief Justice's concluding sentence which we quote as follows:

> "From any point of view, the tax contested is laid upon *interstate sales.*" (McGoldrick, v. Berwind-White Co., 60 S. Ct. 388, Italics are ours)

The Colorado Service Tax Act, therefore, by imposing the service tax upon the beneficiary of the services, fails to impose a tax upon the bank. The Bank is an insurer and a trustee of the monies which it must collect from the renters of its safety deposit vaults, and it receives 3% of its collections as compensation therefor. The Colorado Service Tax Act, therefore, levies no tax upon the bank, but is purely, so far as the Bank is concerned, an administrative statute laying down a course of conduct to be followed by all who engage in such businesses, whether they be national banks or private institutions. This law, therefore, infringes none of the Bank's constitutional rights.

III.

THE BUSINESS OF OPERATING SAFETY DEPOSIT BOXES IS NOT A BANKING FUNCTION, BUT IS A BUSINESS PURELY INCIDENTAL TO BANKING.

Renting safety deposit vaults is not banking. While the vault installation may be a part of the bank building and thus be a part of the bank's physical assets the same as its typewriters and adding machines, the test to be applied is the purpose and use to which it is put. That they are not a necessary adjunct to bank business is apparent from the fact that a bank can, and many banks do, function without them. They are sidelines to the trade. Their purpose and

use is to serve, not the bank in the furtherance of its fiscal powers, but to provide convenient and safe storage space for public rental. They are installed by banks as a competitive feature to attract depositors and the bank exacts a toll for their use. The relationship between the bank and safety deposit box holders is the same as any other bailor for hire. The valuables placed in such depositories are the sole property of the depositor. No pledge, escrow, or trust relationship exists. It is a pure bailment and the subject of the bailment is beyond the control of the bank, its officers, agents, examiners or receivers. When the bailment ends, either voluntarily or the bailor's insolvency, the property in bail must be returned *in kind* or its loss by negligence accounted for.

Such bailments are not special deposits altho safety deposit vaults may be called depositories, but that does not make them banking functions. As the Court observed in the case of *Tuckerman v. Mearns*, 262 Fed. 607:

> "Nor does counsel for plaintiff inmprove his jurisdictional dilemma by calling this a special deposit. A special deposit implies the custody of property without authority in the custodian to use it, and the right of the owner to receive back the identical thing deposited."
>
> Tuckerman v. Mearns (262 Fed. p. 610)

Indeed, it is because of the very fact that safety deposit vaults are 'depositories' that the State of Colorado may tax the services rendered by them. (Opinion Bedford, Treasurer v. Bank, Tr. Rec. 26)

A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business. The powers of National Banks are enumerated in *R.S.* 5136, cited by counsel, both general and

necessary incidental. The power to engage in the safety deposit service is not among them. Congress, by this exclusion has, therefore, recognized the fact that such services are purely incidental to banking. Indeed, it is no part of banking as such at all.

In the case entitled *Kimen v. Atlas Exchange Natl. Bank*, (92 Fed. (2d) 615) on the subject of powers of National Banks, the Court said:

> "National banks may rightfully exercise only such powers *as are expressly granted and such as are necessarily incidental* to the effectuation of their charter of purposes. Incidental powers can avail neither to create powers which expressly or by reasonable implications are withheld nor to enlarge the powers granted. They are inferred and exist only to carry into effect such powers as are granted. First Natl. Bank v. Missouri; 263 U. S. 640; 44 S. Ct. 213; 68 L. Ed. 486." (Kimen v. Bank, 92 Fed. (2d) 615, Italics are ours)

The provisions of *R.S.* 5136 relating to safety deposit boxes is not a power conferred but is a permission to national banks to conduct such a business under *separate* state organizations, with limitations and the provisions of *Sec.* 5228 *R.S.* prohibiting national banks from continuing business after notice by the controller "except to receive and safely keep money belonging to it *and to deliver special deposits*" clearly recognizes that safety deposit box service is separable both as a banking business and as the service of a governmental instrumentality.

Counsel for appellant rely on *"Bank of California v. Portland"* (157 Ore. 203, 69 P. (2d) 273,) as their authority to the contrary. That case, however, invokes a city license ordinance upon the national bank itself, to be paid by the bank for the privilege of conducting the safety deposit box

business. It was a direct tax upon the bank, an admitted instrumentality of the federal government. Here we have a tax, not upon the bank but upon the user of its services. The Portland case is neither in point nor decisive of any issue herein presented.

IV.

THE SAFETY DEPOSIT BOX BUSINESS RENDERS A SERVICE WHICH IS A PROPER SUBJECT FOR TAXATION

The *Public Revenue Service Tax Act of Colorado*, being an excise tax upon the services rendered by the businesses and occupations listed for taxation, is, therefore, a proper exercise of state sovereignty. In Rinn v. Bedford, the Supreme Court of Colorado, in connection with a general challenge to the constitutionality of the Public Revenue Service Tax Act, said:

> "We consider next the question whether the act may lawfully require the plaintiff as an attorney at law to collect the tax from those for whom he himself performs services. The argument that he is thereby unlawfully constituted a collector of taxes against his will, and that the compensation provided for the collection is inadequate and confiscatory, must fall, for there is no distinction in principle between such collection and the collection, for instance, of a gasoline tax, which is collected by the seller from the purchaser as part of the purchase price and thereupon turned over to the government. That the tax under consideration is a service tax and the other a sales tax can make no material difference. Both are excise taxes. Their creation is within the plenary power of the General Assembly, in the absence of specific constitutional inhibitions. The service tax is certainly not a

property tax, as claimed by the plaintiff, and consequently constitutional provisions which, like section 11 in article X of the Colorado Constitution for instance, safeguard the rights of private property are not in point. The method of collection is not shown to be unlawful, in fact it seems the only practical method; but this again is purely a matter of policy left by our Constitution to the discretion of the legislative branch of our state government. the wisdom or unwisdom of the legislation is not for us to decide."

(Rinn v. Bedford, 102 Colo. 475, 479, 480)

The *Public Revenue Service Tax Act of Colorado*, being an excise tax upon services rendered or performed, is not and cannot be construed as a tax upon the bank, its shares of stock or its property, nor does it lay a direct burden upon the federal government or its instrumentalities.

The same hue and cry was raised over a tax imposed by West Virginia upon gross receipts of contractors under contracts with the United States government, resulting in the case of *James v. Dravo Construction Company.* (302 U.S. 134; 58 S. Ct. 208). This Honorable Court in the James case, supra, made an exhaustive analysis of the questions as to where and when state laws impose burdens upon the government and held that "the West Virginia tax, so far as it is laid upon the gross receipts of respondent derived from its activities within the borders of the state does not interfere in any substantial way with the performance of federal functions and is a valid exaction." (*James v. Dravo Construction Co.* 302 U.S. 134). The same conclusion was reached as to the occupational tax of the State of Washington in this Honorable Court's decision of "*Silas Mason Co. v. Tax Division.*" (302 U.S. 186, 58 S. Ct. 233).

Appellant's objection that the tax law invoked is prohibited by the provision of *R.S.* 5219, is likewise without foundation. That Act prohibits taxation of bank shares except in conformity to the standards set up in the Act. Section 3 thereof expressly provides:

> "Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed." (R.S. 5219 amended, Sec. 3; 12 U.S.C.A. Sec. 548).

In the case of *Clement National Bank v. Vermont*, 231 U.S. 120, the court held that a state tax on savings deposits was a tax upon the property of the depositors, and in spite of the fact that under the same law the bank might make annual returns for its depositors and pay the tax itself out of earned interest on the deposits, the law was held constitutional and not forbidden by *R.S.* 5219. In construing the federal statute the court said:

> "To be opened to such an objection, it must appear that the scheme of taxation constitutes an injurious discrimination. Even in the case of shares of the capital stock of national banks, which cannot be taxed save with the consent of Congress (citation) taxation by the State is expressly permitted if it is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. Rev. Stat. Sec. 5219. The object is to prevent hostile discrimination and for this purpose a standard is fixed. (Citation) With respect to the taxation of depositors' credits, the Federal statute does not prescribe a rule; and the property being normally subject to the State's taxing power, there is no warrant for implying a restriction which

would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory." (Clement v. Bank, 231 U.S. 120)

In the instant case, therefore, the services rendered by safety depositories being normally subject to the state's taxing powers and the rate of tax on that service being uniform, there is no warrant for implying restrictions upon the exercise of that power in cases where national banks are concerned. Indeed, if appellant's contention is correct the only discrimination which would arise would be in favor of the national banks and against a state association operating such a business.

V.

THE BURDENS IMPOSED BY THE PUBLIC REVENUE SERVICE TAX ACT ARE NOT REPUGNANT TO THE UNITED STATES CONSTITUTION: NOR DISCRIMINATORY. THESE ISSUES ARE NOT PROPERLY BEFORE THIS COURT.

There is no discrimination in the tax imposed. It applies to all banks, state and national, and to any person conducting a safety deposit box business independent of banking operations. (*James v. Dravo Construction Co.* 302 U.S. 134, 58 S. Ct. 208). Nor may counsel for appellant claim discrimination because of an alleged change in the Treasurer's rulings. Under Section 19, Public Revenue Service Tax Act of Colorado, the Treasurer is charged with the enforcement and administration of the Act and clothed with the powers to *adopt*, *amend* and *rescind* general and special rules for the ascertainment, assessment and collection of the tax. (*Sec.* 19, *Chap.* 158, *S.L. Colo.* '39). The bank being amenable to the state law, cannot be heard to complain because the Treasurer did his duty in the enforcement of that law.

Appellant contends that the *Public Revenue Service Tax Act* threatens its property with a lien and places a burden upon it in its requirement that the bank collect and pay the tax to the state contrary to the federal Constitution. They cite as their authority the "Opinion of the Justices" (New Hampshire).

> "3 By the bill the tax is placed upon the purchaser. Although the seller is required to guarantee, collect, account for, and pay it, he is also required to add it to the price of the article sold and may not assume, absorb or refund it. The duty thus devolved upon him to act as the collector of the tax *without adequate compensation for the service*, a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. It would not be a service incidental to the ascertainment of his own taxes." (Opinion of Justices, N.H. 190 Atl. 801,804—italics are ours.)

The Justices' objections to the tax is because adequate compensation is not afforded the collector. Section 6 (a) of the *Public Revenue Service Tax Act of Colorado* provides that every person rendering or performing services shall be liable for the payment of the entire amount of the tax, shall make monthly returns and remittances of collections to the state treasurer *"less three (3) per cent thereof to cover the expense of the person rendering or performing the services in the collection and remittance of said tax."* The Colorado law, therefore, does provide compensation for collection and the unique opinion of the New Hampshire Justices is inapplicable. It should be observed that the New Hampshire opinion is the only opinion of its kind. It flies in the teeth of every sales and service tax act in the nation, and if that be the law, would nullify all state legislation as well as the present federal tax on safety deposit boxes enacted by

Congress (*R.S. Sec.* 1134—1138. *Fed. Code Ann. Vol. 6A p. 96, chap. 16*).

That such is not the law has been too frequently decided to be disputed. All state and federal gasoline taxes have been sustained. As to sales and service taxes, we have the sanction of this Honorable Court in the case of *McGoldrick v. Berwind-White Co.* (60 S. Ct. 388) to the New York City Sales Tax, which makes the vendor, whether he wishes it or not, an insurer charged with the duty of collecting the tax. The matter was considered by the Kentucky Court in the case City of Covington v. Tax Commission. That court said:

> "The first part of the Act is taken up with a definition of terms. Then follows a recitation of the commodities the sale of which is taxed and the sale of each of which, according to the literal language employed, is imposed on the sellers thereof * * * but it is distinctly prescribed in each of the subsections that the seller is required to collect the tax from the purchaser of the commodity taxed. Other and later provisions imposed the duty on him (seller) to make periodical reports to the State Tax Commission of the amount of his gross receipts since the last report with the taxes collected from and paid by the various purchasers and pay into the treasury through the Tax Commission that amount. By Section 4 of the Act he is given the right to deduct from the amount of the tax so collected from his purchasers, 3 per cent as compensation for his services in collecting it." (Covington v. Tax Commission (Ky) 257 Ky. 84, 77 S.W. (2d) 386).

The court then recognized the constitutionality of the Kentucky statute, and held:

> "We have reached the conclusion that the tax was not imposed upon the seller but on the pur-

chaser or buyer of the goods. The seller is required by statute to act as the collecting agency for the state. The law also provides that, for collecting and reporting this tax, *the seller shall be paid for his services.*" (Covington v. Tax Commission, 257 Ky. 84; 77 S.W. (2d) 386—Italics are ours).

Furthermore, the bank, being an artificial person, cannot claim immunity as guaranteed by the Fourteenth Amendment to the Constitution of the United States, since no right of property is involved. *Pierce v. Society of Sisters* (268 U.S. 510; 45 S.Ct. 571) cites with approval the doctrine laid down in *Northwestern Life Ins. Co. vs. Riggs* (203 U. S. 243) when this Honorable Court said:

> 'Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. *The liberty referred to in that Amendment is the liberty of natural, not artificial persons* * * *.* This is too plain for discussion." (Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243. Italics are ours).

Appellant proceeds further with its constitutional contention that the Colorado Public Service Tax Act threatens its property with a lien and distraint process together with additional pains and penalties in the event it should fail or refuse to collect the tax imposed and remit the same to the treasurer. We must here again point out the fact that these contentions are not in the pleadings, or properly before either the Supreme Court of Colorado or this Honorable Court on appeal. Appellant is bound by its answer filed in the original case. That answer contains no allegation that the Public Revenue Service Tax Act is contrary to the Constitution of the United States or the laws of the State of Colorado; (Tr. Rec. p. 5-10) except that the bank is immune by virtue of its being a federal agent. The findings of law

entered by the trial court fail to cover these contentions. (Tr. Rec. p. 16). They were not included in the bill of exceptions and assignments of error filed with the Supreme Court of Colorado in the case of *Bedford, Treasurer, v. Bank,* the subject matter of this appeal. Counsel for appellant, however, did by filing written objections to the entry of judgment by the trial court upon the remittitur, attempt then to inject them into the case and proceeded to incorporate them in their assignments of error and bill of exceptions in their appeal under the title *Colorado National Bank v. Bedford* (Tr. Rec. p. 31-35). That appeal was not from a trial *de novo* but was a continuation of the original case and the appeal was taken from an order of remittitur commanding the trial court to enter its judgment in accordance with the findings of fact and conclusions of law in the original case. We know of no rule of pleading, either state or federal, by which a party by filing objections to the entry of a judgment, can add to or detract from his sworn pleadings so as to inject additional causes of action or defenses.

These constitutional defenses, therefore, here first sought to be presented for consideration, are not in the pleadings, they were not pleaded as defenses in the trial court, they were not determined in the cause now sought to be reviewed and should not be considered or determined in this appeal.

As to the merits of such an argument, we rest upon the proposition that the Public Revenue Service Tax Act is enforceable without the lien or the pains and the penalties of which appellant complains, and that a determination of their constitutionality is wholly unnecessary to a decision herein.

A national bank, even though a federal agent, is subject to apt local state laws and regulations, the same as any other federal agency, and subject to the powers of State sovereignty. The sole restriction is that the state laws shall

not work a discrimination against the agency as applied to similar agencies organized under state laws or constitute a burden which would impair its efficiency in executing federal functions. So said this Honorable Court in numerous decisions and we quote its language in the case of *James v. Dravo Construction Co.*:

> "Respondent has no constitutional right to immunity from nondiscriminatory local taxation, and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the government, and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the government and which the government disclaims."
>
> (James v. Dravo Construction Co., 302 U.S. 134, 58 S. Ct. 208).

CONCLUSION

In conclusion, we submit, that the sole issues involved in the instant case are (1) Who pays the Service Tax, the bank or the user, and (2) Is the bank as a federal agency immune from the operation of the statute. The Supreme Court of Colorado by its decision has resolved those questions adversely to the bank and its construction of the Service Tax Act is controlling. The case, therefore, presents no substantial federal question and jurisdiction of the appeal by this Honorable Court should be refused.

As to the merits of the controversy, we submit, that the tax involved being a tax upon the user of the services is not a tax upon the bank and that when a national bank steps out of its character as a federal agent administering the fiscal policies of the United States and into a field of endeavor which is wholly unnecessary and purely incidental to and aside from the exercise of banking powers,

it loses its cloak of immunity from state laws, and cannot in equity, be permitted to use its federal shield as a sword.

The judgment of the Supreme Court of the State of Colorado, therefore, in the causes presented by this appeal, should be affirmed.

Respectfully submitted,

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8.4

SUPREME COURT OF THE UNITED STATES.

No. 719.—October Term, 1939.

The Colorado National Bank of Denver, Appellant, v. Homer F. Bedford, as Treasurer of the State of Colorado.	Appeal from the Supreme Court of the State of Colorado.

[April 22, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal involves the validity of the Public Revenue Service Tax Act of Colorado.[1] The act, section 5, imposes upon the services specified in the act, a percentage tax based upon the value of the services rendered or performed by any person subject to its provisions.

Section 5(c) imposes a tax equivalent to two per cent of the value of services rendered by "banks, finance companies, trust companies and depositories . . . . ." The person rendering the services "shall be liable and responsible for the payment of the entire amount . . ." Section 6. He is required to remit all taxes collected and due the state from him to the treasurer less three per cent to cover the expense of the service. Under section 6(b) persons rendering or performing the services are required "as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts." By subsection (d) the person rendering the service is forbidden to hold out directly or indirectly that he will assume or absorb the tax. By section 7 the user may recover illegally collected taxes. Where services are rendered which become a part of an article subject to a sales tax, the services are exempt

[1] Session Laws of Colorado, 1937, c. 240, p. 1144. The act was amended and reenacted May 1, 1939. Session Laws of Colorado, 1939, c. 158, p. 526. This later act is not material in this appeal.

and the person performing the service recovers where they are illegally assessed. Section 3. By section 12, all sums paid by the user as taxes are public money and trust funds of the State of Colorado. It is made a misdemeanor, section 17, for any person rendering or performing services to refuse to make the returns required. The state treasurer is made administator of the act and given authority to issue regulations. Section 19. The usual separability clause is contained in the act. Section 22.

The definitions of the act appear in section 2. By its subsection (c) the term "services rendered or performed" is defined as those rendered for a valuable consideration by a person covered by the act for the ultimate user thereof. "The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed." By subsection (e) taxpayer is defined as "any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act." Subsection (h) provides for a credit on future taxes of a tax paid on accounts eventually found worthless.

Under the rules and regulations issued by the treasurer on the Public Revenue Service Tax Act, the service tax is construed as invalid as applied to so-called banking services.[2]

Under rule 27, however, such service as the furnishing of safety vaults by depositories or banks is held to come within the act, and the two per cent tax applies to the charges made for this service. These regulations were approved by the judgment and decree of the trial court and that judgment was affirmed in all particulars by the Supreme Court of Colorado.

While section 4(a) makes it unlawful for any person to render the defined services without "first having obtained a license therefor," the treasurer demands no license fees from a national bank. Such exception was held proper by the lower court.[3]

The appellant here, the Colorado National Bank, was a national banking corporation duly organized and existing under the national banking act. The bank operated a safe-deposit service under its own name and in the building and vaults used for its other banking activities. The rentals received for the use of that portion of its vaults utilized for safe-deposit boxes were reported to the Comp-

[2] Rules and Regulations, Public Revenue Service Tax Act of 1937, No. 10, republished October 27, 1937.

[3] Bedford v. Colorado Bank, 104 Colo. 311, 315.

troller of the Currency as income in the bank; the fixtures employed in the business are part of the assets of the bank and are supervised by the Comptroller of the Currency.

The appellee Bedford, as treasurer of the State of Colorado and administrator of the Service Tax Act, demanded payment from appellant bank of two per cent of the value of the services rendered by the bank to its safe deposit box customers. The bank refused payment and the treasurer brought this action under the Uniform Declaratory Judgments Act (Colorado Stat. Anno., 1935, c. 93, §§ 78-79) for a declaration of rights to the effect that the services performed by the bank are taxable pursuant to the Service Tax Act. The bank answered claiming the state statute as applied to it was repugnant to the Constitution and laws of the United States; setting up the immunity of national banks from state taxation except as permitted by R. S. section 5219;[4] claiming that the safe-deposit business of national banks was authorized by Congress and therefore was part of its federally authorized business, immune from taxation whether the bank or the user of its services is the taxpayer. The bank further contended that even though it is not the taxpayer and the tax burden as such is not unlawful, the burden of collection, report and visitation materially interfere with the performance of its national banking functions. A general demurrer to the answer was filed.

The trial court sustained the bank. The supreme court first affirmed by an equally divided court and then on rehearing reversed[5] and remanded the case to the district court. The trial court entered a second judgment declaring as prayed by the treasurer which judgment was affirmed by the supreme court on the authority of the former decision.

(1) This appeal is here under section 237(a) of the Judicial Code. The treasurer makes the point that as the federal question raised

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[4] 12 U. S. C. § 548

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

[5] Bedford v. Colorado Bank, *supra.*

was the immunity to the exaction of the bank as a federal instrumentality withdrawn from state taxation by congressional action, the determination that the tax was on a non-banking activity foreign to its federal character and on the user of the services eliminated the necessity of a decision on the federal question. As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of state taxation of national banks must accord with R. S. section 5219 and must not interfere with federal functions,[6] it seems clear the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal.[7]

Gully v *First National Bank*,[8] relied upon by the treasurer, dealt with the right to remove to a federal court[9] because the cause of action arose under the federal laws,[10] but the issue here is the right to appeal where a state statute is held valid against a defense of repugnancy to the same laws.[11] The difference is brought out in the *Gully* case, where it is said: "If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense."[12]

(2) The genesis of the present system of national banks is the National Bank Act of June 3, 1864.[13] It was called "An Act to provide a National Currency, secured by a pledge of United States Bonds and to provide for the Circulation and Redemption thereof." From this act, correlated with the Federal Reserve Act,[14] there has developed the present nationwide banking facilities. R. S. section 5153 makes these associations the depositories of public money. Though the national banks' usefulness as an agency to provide for currency has

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6 *Ibid.*

7 California Powder Works v. Davis, 151 U. S. 389, 393; Indiana *ex rel.* Anderson v. Brand, 303 U. S. 95, 98; cf. Owensboro National Bank v. Owensboro, 173 U. S. 664; Clement National Bank v. Vermont, 231 U. S. 120; Federal Land Bank v. Crosland, 261 U. S. 374.

8 299 U. S. 109.

9 Judicial Code, § 28.

10 Judicial Code, § 24.

11 Judicial Code, 237a.

12 299 U. S. at 115.

13 13 Stat. 100.

14 38 Stat. 251.

diminished markedly, their importance as general bankers shows a constant growth.[15] We may assume that national banks possess only the powers conferred by Congress.[16] These are set out in R. S. section 5136 as frequently amended and include "all such incidental powers as shall be necessary to carry on the business of banking," with the proviso "that in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus."[17] We have recently found the authority to secure federal funds within these incidental powers, coupled with a long continued practice recognized by the Comptroller of the Currency.[18] The right to accept special deposits is recognized by the banking act.[19] These are monies and other valuables the identical deposits of which are kept, preserved and returned in kind. It differs little if at all from a safe-deposit business. The language of the proviso of section 24, just quoted, is the language suitable to impose restrictions on a recognized power, not the language that would be used in creating a new power. As the limitation on the power to invest in real estate protected in a measure customers and stockholders from risky investments,[20] the banks own investment in safety deposit facilities evidently did not seem to Congress to require the same regulation as the purchase of stock in a safe-deposit corporation. A subsidiary safe-deposit corporation would give priority to the creditors of the

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[15] April 6, 1940, Treasury Daily Statement shows $172,081,172 in national bank notes outstanding on March 1, 1940. Compare with $1,122,452,661 outstanding October 31, 1914. Report of the Comptroller of Currency, 1935, p. 833. On March 1, 1940, there was outstanding over $5,000,000,000 in Federal Reserve notes.

The number of national banks as of October 31, 1938, is 5247, capital accounts (capital surplus and undivided profits) $3,305,575,000, and deposits $27,103,881,000. Report of the Comptroller of the Currency, 1938.

[16] Texas & Pacific Ry. *v.* Pottorff, 291 U. S. 245, 253; Marion *v.* Sneeden, 291 U. S. 262.

[17] 12 U. S. C. § 24.

[18] Inland Waterways Corporation, etc. *v.* Young, No. 6 this Term, decided March 25, 1940.

[19] R. S. 5228, 12 U. S. C. § 133.

[20] 12 U. S. C. § 29:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business."

subsidiary over the depositors and other creditors of the bank itself. The obvious fact, known to all, is that national banks do and for many years have carried on a safe-deposit business. State banks, quite usually, are given the power to conduct a safe-deposit business.[21] We agree with the appellant bank that such a generally adopted method of safeguarding valuables must be considered a banking function authorized by Congress.[22]

(3) We may assume, as did the Supreme Court of Colorado, that the tax is invalid, if laid upon the bank as an instrumentality of government in the incidents referred to in the preceding section;[23] that its banking operations are free from state taxation except as Congress may permit;[24] that Congress permits the taxation only of shares and real estate;[25] and that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness.[26]

Congress has not legislated against taxation of the customers of national banks. This court has approved a tax assessed upon the deposits of customers of national banks.[27] By section 6 of the Colo-

[21] Paton's Digest, 1926, Vol. 2, p. 2246, lists 24 states and territories which authorize their banks to conduct a safe deposit business. For example, Maine Act of 1923, c. 144, § 6, (V), authorizes savings banks to "own, maintain and let safe deposit boxes and vaults." Ohio, Gen. Code (1921), § 710-109, empowers banks to let out safe deposit boxes. California, Gen. Laws (1923), Act 652, § 30, any bank may conduct a safe deposit department, but shall not invest more than one tenth of its capital and surplus in such safe-deposit department.

[22] The language of the proviso first appeared in an act to further amend the national banking laws of the Federal Reserve Act enacted February 25, 1927, 44 Stat. 1224, section 2(b). Only immaterial verbal changes have occurred since the first adoption.

Referring to this proviso the House report said: "The second proviso regulates the safe-deposit business of national banks and prohibits them from investing an amount in excess of 15 per cent of capital and surplus in a corporation organized to conduct a safe-deposit business in connection with the bank. This is a business which is regularly carried on by national banks and the effect of this provision is also primarily regulative." H. Rep. No. 83, 69th Cong., 1st Sess., p. 4.

[23] Cf. Osborn v. U. S. Bank, 9 Wheat. 738, 862; Owensboro National Bank v. Owensboro, 173 U. S. 664, 668; Bank of California v. Richardson, 248 U. S. 476, 483. Also Smith v. Kansas City Title Co., 255 U. S. 180, 212.

[24] Farmers', etc. National Bank v. Dearing, 91 U. S. 29; Easton v. Iowa, 188 U. S. 220; First National Bank v. California, 262 U. S. 366.

[25] R. S. § 5219; Owensboro National Bank v. Owensboro, 173 U. S. 664, 668, 676.

[26] Pittman v. Home Owners Loan Corp., No. 10 this Term, decided November 6, 1939, and cases cited; James v. Dravo Contracting Co., 302 U. S. 134, 160; First National Bank v. Missouri, 263 U. S. 640, 656.

[27] Clement National Bank v. Vermont, 231 U. S. 120, 133.

rado act the "person rendering or performing services shall be liable"[1] for the payment of the tax imposed. But as subsection (b) of that same section requires the tax paid to be added to the charges for service "as a separate and distinct item" and makes it a debt from the user of the services until paid, the tax is upon the user of the safe deposit boxes, not upon the bank. Furthermore, as by section 2(h) credit is given to the bank for taxes paid on accounts subsequently found worthless and the bank is in a position to require payment of box rentals and taxes in advance, there is no occasion for a bank ever to have saddled upon it any part of the tax burden.

In *National Bank* v. *Commonwealth*[28] this Court determined a similar question in favor of the validity of the state tax. The case was decided in 1869. At that time the applicable federal statute[29] read: "*Section* 41. . . . *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person . . . , from being included in the valuation of the personal property of such person . . . in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere. . . ."

The statute of Kentucky laid a tax of fifty cents on each share. The same statute enacted: "The cashier of a bank, whose stock is taxed, shall, on the first day in July of each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent. upon the amount; and the said bank or corporation shall thereby forfeit the privileges of its charter."

A national bank refused payment on the ground that it as a bank was not subject to state taxation. It was decided that this was a tax on shares, that the state in a legal proceeding against the shareholder could have garnisheed the bank and that because the bank was a federal instrumentality was no reason for not requiring it to collect and pay over the money from the shareholder. A similar tax was upheld in *Des Moines Bank* v. *Fairweather*.[30]

The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself.[31] The funds which were received by the

[28] 9 Wall. 353.

[29] 13 Stat. 111.

[30] 263 U. S. 103, 111; cf. Gully v. First National Bank, 299 U. S. 109, 116.

[31] Stahmann v. Vidal, 305 U. S. 61.

State came from the assets of the user, not from those of the federal instrumentality, the bank.[32] The Colorado Supreme Court holds the user is the taxpayer.[33] The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling.[34] As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by section 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax.

(4) The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality.[35] Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[32] Helvering v. Therrell, 303 U. S. 218, 225.

[33] Bedford v. Colorado Bank, 104 Colo. 311, 319; cf. Bedford v. Hartman Brothers, 104 Colo. 190, 194.

[34] Clement National Bank v. Vermont, 231 U. S. 120, 134.

[35] National Bank v. Commonwealth, 9 Wall. 353; Des Moines Bank v. Fairweather, 263 U. S. 103, 111; cf. Waite v. Dowley, 94 U. S. 527; Monamotor Oil Co. v. Johnson, 292 U. S. 86, 93; Code of Iowa, 1931, § 5093a(5); Felt & Tarrant Co. v. Gallagher, 306 U. S. 62, 68; McGoldrick v. Berwind-White Coal Co., No. 475 this Term, decided January 29, 1940.